

# TRANSCRIPT OF RECORD

26

## SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

1925

No. 80

THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN,  
AND FRANK WHITE, AS TREASURER OF THE UNITED  
STATES, PETITIONERS,

vs.

*Hickov*  
BENJAMIN GUINNESS, WALTER T. ROSEN, MORITZ  
ROSENTHAL, ET AL., ETC.

No. 81

BENJAMIN GUINNESS, WALTER T. ROSEN, MORITZ  
ROSENTHAL, ET AL., ETC., PETITIONERS,

vs.

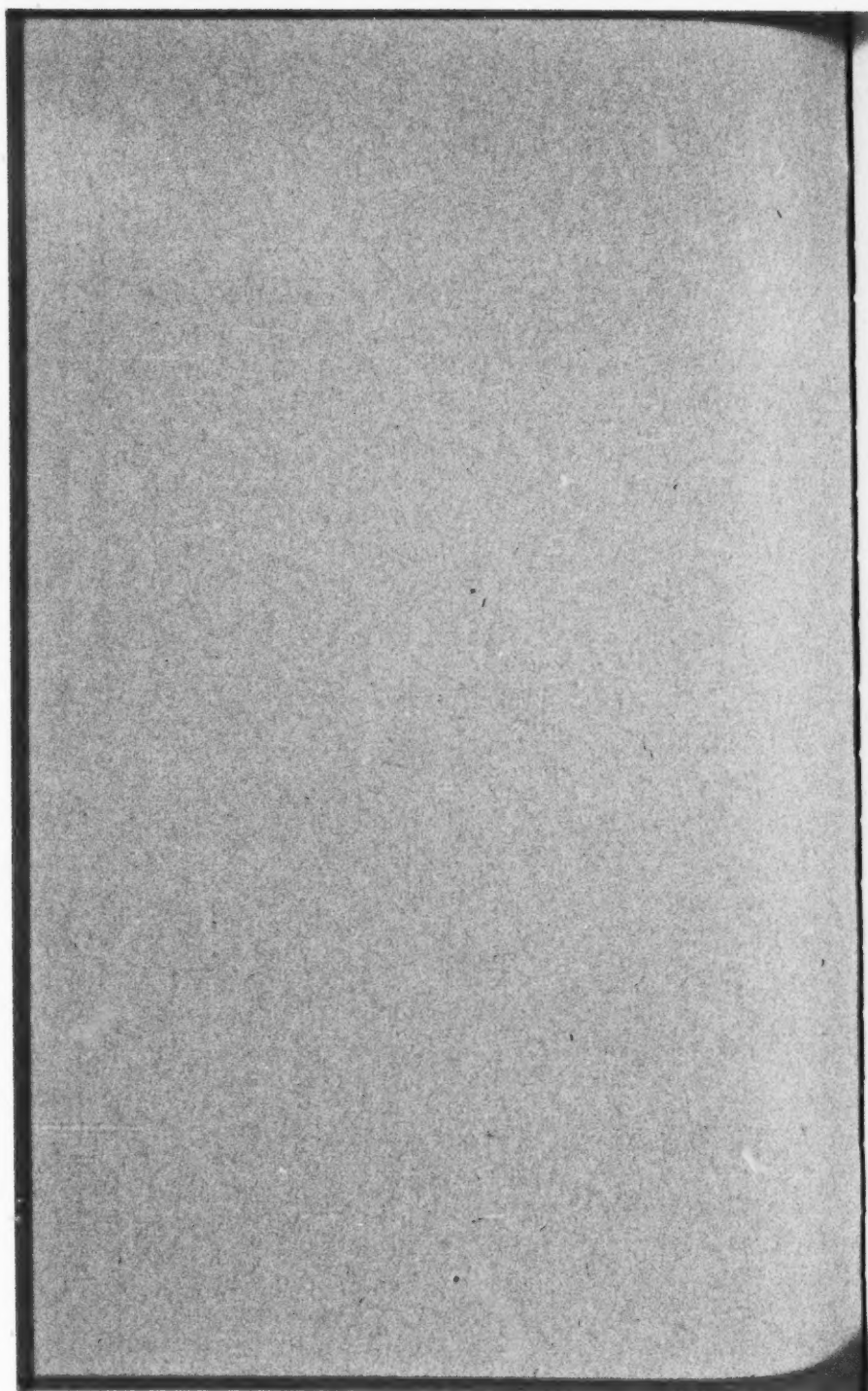
THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN;  
FRANK WHITE, AS TREASURER OF THE UNITED  
STATES, AND CARL JOERGER ET AL., ETC.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE SECOND CIRCUIT

PETITIONS FOR CERTIORARI FILED MAY 31, 1924

CERTIORARI GRANTED JUNE 9, 1924

*Graced*  
(30,383, 30,384)





(30,383, 30,384)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

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**No. 420**

THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN,  
AND FRANK WHITE, AS TREASURER OF THE UNITED  
STATES, PETITIONERS,

*vs.*

BENJAMIN GUINNESS, WALTER T. ROSEN, MORITZ  
ROSENTHAL, ET AL., ETC.

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**No. 421**

BENJAMIN GUINNESS, WALTER T. ROSEN, MORITZ  
ROSENTHAL, ET AL., ETC., PETITIONERS,

*vs.*

THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN;  
FRANK WHITE, AS TREASURER OF THE UNITED  
STATES, AND CARL JOERGER ET AL., ETC.

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	Original	Print
Record from the district court of the United States, southern district of New York.....	1	1
Bill of complaint in case No. E22/308.....	1	1

	Original	Print
Exhibit A—Letter from Delbruck, Schickler & Co. to Ladenburg, Thalmann & Co., January 6, 1920.....	7	4
Subpoena .....	8	4
Motion to dismiss.....	10	5
Order overruling motion to dismiss.....	12	5
Answer .....	14	6
Statement of evidence.....	19	8
Opinion, Hand, J., in case No. 22-296.....	24	10
Opinion in case No. 22-308.....	27	11
Final decree in case No. 22-308.....	32	13
Assignment of errors, defendants below, 22-308.....	34	14
Assignments of error, plaintiffs below, case No. 22-308....	37	15
Notice of appeal, defendants below, case 22-308. ....	39	16
Notice of appeal, plaintiffs below, case 22-308.....	41	16
Petition for appeal of defendants below, case 22-308.....	43	17
Petition for appeal of plaintiffs below, case 22-308.....	45	17
Order allowing appeal of defendants below, case 22-308....	47	18
Order allowing appeal of plaintiffs below, case 22-308.....	49	19
Citation.....(omitted in printing) ..	52	19
Stipulation re transcript of record, case 22-308.....	55	20
Clerk's certificate, 22-308.....	57	20
Proceedings in United States circuit court of appeals for sec- ond circuit.....	59	21
Opinion, Manton, J.....	59	21
Judgment .....	70	27
Petition for rehearing.....	72	28
Order overruling petition for rehearing.....	79	31
Clerk's certificate.....	81	31
Orders granting petitions for certiorari.....	82	32

[fol. 1] **IN UNITED STATES DISTRICT COURT, SOUTHERN  
DISTRICT OF NEW YORK**

E22/308. In Equity

**BENJAMIN GUINNESS, WALTER T. ROSEN, MORITZ ROSENTHAL, SID-  
NEY H. MARCH, RUDOLPH METZ and HARRY B. LAKE, and ANNA  
THALMANN and MORITZ ROSENTHAL, as Trustees of the Estate of  
ERNST THALMANN, Deceased, Copartners, Doing Business under the  
Firm Name and Style of Ladenburg, Thalmann & Co., Plaintiffs,**  
against

**THOMAS WOODNUT MILLER, AS ALIEN PROPERTY CUSTODIAN; FRANK  
WHITE, as Treasurer of the United States, and Carl Joerger, Gus-  
taf Ratjen, Ludwig Korte, Arthur Freiherr von Schickler, Marga-  
rete Gräfin von Pourtales, Estate of Ludwig Delbrück, Deceased,  
Copartners, Doing Business under the Firm Name and Style of  
Delbrück, Schickler & Co., Defendants**

**BILL OF COMPLAINT**

To the Honorable the Judges of the District Court of the United  
States for the Southern District of New York:

Benjamin Guinness, Walter T. Rosen, Moritz Rosenthal, Sidney  
H. March, Rudolph Metz and Harry B. Lake and Anna Thalmann  
[fol. 2] and Moritz Rosenthal as Trustees of the Estate of Ernst  
Thalmann, deceased, co-partners doing business under the firm name  
and style of Ladenburg, Thalmann & Co., doing business in the  
State of New York and Southern District of New York, at No. 25  
Broad Street, Borough of Manhattan, City of New York, present  
this bill of complaint against Thomas Woodnutt Miller as Alien  
Property Custodian, Frank White as the Treasurer of the United  
States, and Carl Joerger, Gustaf Ratjen, Ludwig Körte, Arthur Frei-  
herr von Schickler, Margarete Gräfin von Pourtales, Estate of Lud-  
wig Delbrück, deceased, as co-partners doing business under the  
firm name and style of Delbrück, Schickler & Co., all citizens or  
subjects of Germany, and thereupon the plaintiffs complain and say:

1. On and for many years prior to the 26th day of February, 1912,  
the firm of Ladenburg, Thalmann & Co., was a firm of private bank-  
ers doing business in the Borough of Manhattan, City of New York,  
in the Southern District of New York, composed of the following:  
Ernst Thalmann, Benjamin Guinness, Walter T. Rosen and Moritz  
Rosenthal. On the 26th day of February, 1912, the aforesaid Ernst  
Thalmann died, and the representatives of his Estate became part-  
ners in said firm of Ladenburg, Thalmann & Co. pursuant to au-  
thority vested in them by the Will of the said Ernst Thalmann,  
and the said firm of Ladenburg, Thalmann & Co. has continued  
in existence as thus constituted, and has continued to do business as

a firm of private bankers in the Borough of Manhattan, City of New York, except that at various times since the said February 26th, [fol. 3] 1912, the following have been admitted to partnership in the said firm of Ladenburg, Thalmann & Co.: Sidney H. March, Rudolph Metz and Harry B. Lake, who are plaintiffs herein.

2. The defendant Thomas Woodnutt Miller is Alien Property Custodian and the defendant Frank White is Treasurer of the United States. The defendants Carl Joerger, Gustaf Ratjen, Ludwig Körte, Arthur Freiherr von Schickler, Margarete Gräfin von Pourtales, Estate of Ludwig Delbrück, deceased, co-partners, doing business under the firm name and style of Delbrück, Schickler & Co. (hereinafter jointly called "the defendant Delbrück, Schickler & Co.") are citizens or subjects of Germany and were subjects of the Empire of Germany for a long time prior to April 6th, 1917.

3. The grounds upon which the Court's jurisdiction depends are that this is a suit of civil nature in equity brought under the terms of Section 9 of an Act of Congress entitled "An Act to define, regulate and punish Trading With the Enemy, and for other purposes," approved October 6th, 1917, as amended.

4. That the firm of Ladenburg, Thalmann & Co. has heretofore duly filed with the said Alien Property Custodian a notice of its claim against the defendant Delbrück, Schickler & Co. under oath, and in such form and containing such particulars as the said Alien Property Custodian did pursuant to law require.

5. Upon information and belief, that property of the defendant Delbrück, Schickler & Co. has been conveyed, transferred, assigned, [fol. 4] delivered or paid to the defendant Alien Property Custodian, or seized by him pursuant to the terms of the aforesaid Act of Congress, and such property is held by him or by the defendant the Treasurer of the United States in the Southern District of New York in an amount greater than the amount of the claim of the said firm of Ladenburg, Thalmann & Co. so filed with the Alien Property Custodian, and in an amount greater than the amount sought to be recovered in this suit in equity.

6. For many years prior to April 6th, 1917, the defendant Delbrück, Schickler & Co. was engaged in transactions with the aforesaid firm of Ladenburg, Thalmann & Co.

7. That on April 6th, 1917, the defendant Delbrück, Schickler & Co. was indebted to the said firm of Ladenburg, Thalmann & Co. That the account between the aforesaid firm of Ladenburg, Thalmann & Co. and the said defendant Delbrück, Schickler & Co. was stated between the same on January 6th, 1920, as of January 1, 1916, at Marks 1,079.35, and thereafter there were no dealings between the aforesaid firm of Ladenburg, Thalmann & Co. and the said defendant Delbrück, Schickler & Co., as shown by the letter of the defendant Delbrück, Schickler & Co. dated January 6th, 1920, hereto annexed and marked Exhibit "A." That the said sum of Marks

1,079.35, converted into dollars at the pre-war rate of exchange, at the rate of  $17\frac{1}{2}$  cents per Mark, shows an indebtedness by the defendant Delbrück, Schickler & Co. of \$188.89, and with interest at the rate of  $11\frac{1}{2}\%$  per annum, the rate of interest agreed upon between the aforesaid firm of Ladenburg, Thalmann & Co. and the said defendant Delbrück, Schickler & Co., there was owing by the [fol. 5] said defendant Delbrück, Schickler & Co. to the aforesaid firm of Ladenburg, Thalmann & Co. as of May 9th, 1919, the sum of \$198.40. The date of May 9th, 1919, is selected, because the said account between the aforesaid firm of Ladenburg, Thalmann & Co. and the defendant Delbrück, Schickler & Co. was adjusted as of that date, together with numerous other accounts of the aforesaid firm of Ladenburg, Thalmann & Co. with alien enemies, between the aforesaid firm of Ladenburg, Thalmann & Co. and the Alien Property Custodian as the date as of which such accounts should be settled.

8. The aforesaid firm of Ladenburg, Thalmann & Co. concedes a separate indebtedness to the defendant Delbrück, Schickler & Co. of \$35.35.

Wherefore, plaintiffs pray for judgment (1) that plaintiffs be granted a writ of subpoena to be directed to the said Thomas Woodnutt Miller as Alien Property Custodian, Frank White as Treasurer of the United States, and Delbrück, Schickler & Co., a citizen or subject of Germany, requiring them and each of them, at a certain time and under a certain penalty therein to be stated, personally to appear before this Honorable Court and, to then and there, full, true, direct and perfect answer to make to all and singular the premises, and further to do and perform all orders and decrees that shall be made herein. (2) Establish the interest and right of plaintiffs in the property held by the defendants Alien Property Custodian and Treasurer of the United States, and require them to pay to plaintiffs the sum of \$163.05, the amount of the indebtedness of the defendant Delbrück, Schickler & Co. to the plaintiffs. (3) That said Alien Property Custodian and Treasurer of the United States shall retain all property of Delbrück, Schickler & Co. until this suit is terminated. (4) That plaintiffs have such other and further relief as to the Court may seem just.

Van Vorst, Marshall & Smith, Solicitors and Counsel for Plaintiffs.

Office and Post Office Address, No. 25 Broad Street, Borough of Manhattan, New York City.

Jurat showing the foregoing was duly sworn to by Sidney H. March omitted in printing.



## [fol. 7] EXHIBIT A TO BILL OF COMPLAINT

Delbrück, Schickler &amp; Co.

Adresse für Depeschen: Delbruckbank Berlin, Kt.

Berlin, W. 66, den 6. Januar, 1920.

Herren, Ladenburg, Thalmann &amp; Co., New York:

Wir empfangen Ihr Schreiben vom 4. Dezember 1919 und teilen Ihnen mit, dass Sie am 1. Januar 1916 in unseren Büchern ein Guthaben von M 1 079.35 hatten, seit diesem Tage war Ihr Konto umsatzlos; über den Ihnen zu bewahrenden Zinssatz wird später Entscheidung getroffen werden.

Delbruck, Schickler &amp; Co.

## [fol. 8] IN UNITED STATES DISTRICT COURT

## SUBPENA

The President of the United States of America to Thomas Woodnutt Miller, as Alien Property Custodian, Frank White, as Treasurer of the United States, and Carl Joerger, Gustaf Ratjen, Ludwig Körte, Arthur Frieherr von Schickler, Margarete Gräfin von Pourtales, Estate of Ludwig Delbrück, deceased, co-partners, doing business under the firm name and style of Delbrück, Schickler & Co., defendants, Greeting:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by Benjamin Guinness, Walter T. Rosen, Moritz Rosenthal, Sidney H. March, Rudolph Metz and Harry B. Lake and Anna Thalmann and Moritz Rosenthal, as Trustees of the Estate of Ernst Thalmann, deceased, co-partners doing business under the firm name and style of Ladenburg, Thalmann & Co., plaintiffs, and to further do and receive what the said Court shall have considered in this behalf. And this you are not to omit under the penalty on you and each of you of Two hundred and fifty dollars (\$250).

Witness, Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 5th day of December in the year One thousand nine hundred and twenty-one, and of the Independence [fol. 9] of the United States the one hundred and forty-sixth.

Van Vorst, Marshall & Smith, Plaintiffs' Solicitors. Alex. Gilchrist, Jr., Clerk.

The defendants are required to file their answer or other defense in the above cause in the Clerk's Office of this Court on or before the

twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken pro confesso.

Alex. Gilchrist, Jr., Clerk. (Seal.)

[fol. 10]

IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS

Now come the defendants, Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States, separately and severally moving to dismiss the bill of complaint and as grounds for their separate and several motions assign the following:

(1) It appears affirmatively from the allegations of the bill of complaint that the plaintiffs herein have not stated facts sufficient to constitute a ground for equitable relief under Section 9 of the Trading with the Enemy Act, the amendments thereto and the proclamations and executive orders issued thereunder.

Wherefore, these defendants pray that they be dismissed with their costs in this behalf expended and for such other and further relief to which in the premises they may be entitled.

Wm. Hayward, United States Attorney, Solicitor for Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States.

[fol. 12]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OVERRULING MOTION TO DISMISS

A motion having been filed on behalf of the defendants, Thomas [fol. 13] Woodnutt Miller as Alien Property Custodian, and Frank White as Treasurer of the United States to dismiss the bill of complaint, and said motion having been brought on for hearing on the 6th day of January, 1922, and having been argued, and due deliberation having been had,

Ordered, that said motion be, and the same hereby is denied.

J. W. Mack, United States Circuit Judge.

[fol. 14]

## IN UNITED STATES DISTRICT COURT

[Title omitted]

## ANSWER TO THE BILL OF COMPLAINT

Now come the defendants Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States separately and severally answering the bill of complaint and for their separate and several answers say :

(1) They have no knowledge or information sufficient to form a belief with respect to the averments of paragraph numbered First of the bill of complaint, and therefore demand strict proof thereof ;

(2) Answering the averments of paragraph numbered Second of the bill of complaint these defendants admit that Thomas W. Miller is Alien Property Custodian and Frank White is Treasurer of the United States. They have no knowledge or information sufficient to form a belief as to whether the defendants Carl Joerger, Gustaf Ratjen, Ludwig Korte, Arthur Freiherr von Schiekler, Margaret Gräfin von Pourtales, Estate of Ludwig Delbrück, deceased, co-partners, doing business under the firm name and style of Delbrück, Schiekler & Co., are citizens or subjects of Germany and were subjects of the Empire of Germany for a long time prior to April 6, 1917, and therefore demand strict proof thereof ;

(3) The averments of paragraph numbered Third of the bill of complaint are statements of law which these defendants are not required to answer ;

(4) They admit the averments of paragraph numbered Fourth of the bill of complaint ;

(5) Answering the averments of paragraph numbered Fifth of the bill of complaint these defendants say that the Alien Property Custodian, acting under and pursuant to the terms and provisions of [fol. 16] the Trading with the Enemy Act, the amendments thereto and the proclamations and executive orders issued thereunder, after investigation determined that Delbruck & Company was an enemy within the purview and meaning of said act, the amendments thereto and the proclamations and executive orders issued thereunder and that certain money was owing to, and held for, on account of, and for the benefit of the plaintiff herein, and thereupon the Alien Property Custodian required that the said money and other property determined by him to be the property of said enemy, be conveyed, transferred, assigned, delivered and/or paid to him, to be by him held, administered and accounted for as provided by law. Thereafter the Alien Property Custodian acting pursuant to law, paid over to the Treasurer of the United States all of the said money to be by the said Treasurer held, administered and accounted for as provided by law.

And further answering said paragraph these defendants say that the determination of the enemy character of the said partnership and of the enemy ownership of the said property, finally for the purposes of this suit and the plaintiff herein must present strict proof as to the same and this Court must determine out of what if any of the money and other property now held by the Alien Property Custodian any claim which these plaintiffs may establish herein must be paid.

Further answering said paragraph these defendants say that at the hearing of this cause they will render unto this Court a full and exact accounting of all the said money and other property to the end that a just and equitable decree may be rendered herein;

(6) They have no knowledge or information sufficient to form a [fol. 17] belief with respect to the averments of paragraph numbered Sixth of the bill of complaint, and therefore demand strict proof thereof;

(7) Answering the averments of paragraph numbered Seventh of the bill of complaint, these defendants say that they have no knowledge or information sufficient to form a belief with respect to the averments of paragraph numbered Seventh except in so far as the said paragraph alleges that the accounts of the plaintiff with the partnership Delbrück, Schickler & Co., were checked over between the plaintiffs and the Alien Property Custodian and adjusted as of May 9, 1919, and as to this averment these defendants say that accountants employed by the Alien Property Custodian by and with the consent of the defendants herein, audited the books used by the plaintiffs in the conduct of their business, in order to determine for the satisfaction of the Alien Property Custodian the state of the accounts of the plaintiffs' business with respect to enemy transactions, but that no agreement was ever entered into and no account was ever settled by and between the Alien Property Custodian and the plaintiffs herein.

And further answering said paragraph these defendants deny that the plaintiffs herein are entitled to have the amount of any debt owing to them in marks by said enemy defendants computed in United States money at the pre-war rate of exchange, on the contrary these defendants assert that any claim in marks which the plaintiffs may establish to be owing to them by the said enemy defendants, must be determined in United States money as of the date of any judgment or decree which the plaintiffs herein may secure. [fol. 18] Further answering said paragraph these defendants deny that the plaintiffs herein are entitled to interest for the period beginning April 6, 1917, and ending July 2, 1921.

(8) They admit the averments of paragraph numbered Eighth of the bill of complaint.

Wherefore, these defendants having fully answered the bill of complaint pray that they be dismissed with their costs in this behalf

expended and for such other and further relief to which in the premises they may be entitled.

Wm. Hayward, United States Attorney, Solicitor for Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States.

[fol. 19]

IN UNITED STATES DISTRICT COURT

[Title omitted.]

STATEMENT OF EVIDENCE

It is stipulated that the evidence at the trial given by Frederick Wille, Comptroller of the firm of Ladenburg, Thalmann & Co. established the following:

[fol. 20] 1. On and for many years prior to the 26th day of February, 1912, the firm of Ladenburg, Thalmann & Co. was a firm of private bankers doing business in the Borough of Manhattan, City of New York, in the Southern District of New York, composed of the following: Ernst Thalmann, Benjamin Guinness, Walter T. Rosen and Moritz Rosenthal. On the 26th day of February, 1912, the aforesaid Ernst Thalmann died, and the representatives of his Estate became partners in said firm of Ladenburg, Thalmann & Co., pursuant to authority vested in them by the Will of the said Ernst Thalmann, and the said firm of Ladenburg, Thalmann & Co. has continued in existence as thus constituted, and has continued to do business as a firm of private bankers in the Borough of Manhattan, City of New York, except that at various times since the said February 26th, 1912, the following have been admitted to partnership in the said firm of Ladenburg, Thalmann & Co.: Sidney H. March, Rudolf Metz and Harry B. Lake, who are plaintiffs herein.

2. The defendant Thomas Woodnutt Miller is Alien Property Custodian and the defendant Frank White is Treasurer of the United States. The defendants Carl Joeger, Gustaf Ratjen, Ludwig Körte, Arthur Freiherr von Schickler, Margarete Gräfin von Pourtales, Estate of Ludwig Delbrück, deceased, co-partners, doing business under the firm name and style of Delbrück, Schickler & Co. (hereinafter jointly called "the defendant Delbrück, Schickler & Co.") are citizens or subjects of Germany and were subjects of the Empire of Germany for a long time prior to April 6th, 1917.

[fol. 21] 3. That the firm of Ladenburg, Thalmann & Co. heretofore duly filed with the said Alien Property Custodian a notice of its claim against the defendant Delbrück, Schickler & Co. under oath, and in such form and containing such particulars as the said Alien Property Custodian did pursuant to law require, and that therein, the said firm of Ladenburg, Thalmann & Co., claimed an indebtedness of Marks 1,079.35 as of January 1, 1916, converted into



dollars at the pre-war rate of exchange of  $17\frac{1}{2}$  cents per Mark, the said pre-war rate of exchange being the average rate of exchange prevailing for one month prior to April 6th, 1917, the date of the commencement of the war between the United States and Germany, and conceded a separate indebtedness to the defendant Delbrück, Schickler & Co. of \$35.35.

4. For many years prior to April 6th, 1917, the defendant Delbrück, Schickler & Co. was engaged in transactions with the aforesaid firm of Ladenburg, Thalmann & Co.

5. That on April 6th, 1917, the defendant, Delbrück, Schickler & Co. was indebted to said firm of Ladenburg, Thalmann & Co. in the sum of Marks 1,079.35, as of January 1, 1916, as shown by an account stated, dated December 31, 1916, duly acknowledged by the defendant Delbrück, Schickler & Co., and thereafter there were no dealings between the aforesaid firm of Ladenburg, Thalmann & Co. and the said defendant Delbrück, Schickler & Co. The value of the mark on December 31, 1916, was  $18\frac{1}{4}$  cents per mark. The aforesaid firm of Ladenburg, Thalmann & Co. conceded a separate indebtedness to the defendant, Delbrück, Schickler & Co. of \$35.35. [fol. 22] The following facts were stipulated at the trial:

That property of the defendant Delbrück, Schickler & Co. has been conveyed, transferred, assigned, delivered or paid to the defendant Alien Property Custodian, or seized by him pursuant to the terms of the aforesaid Act of Congress, and such property is held by him or by the defendant the Treasurer of the United States in an amount greater than the amount of the claim of the said firm of Ladenburg, Thalmann & Co. so filed with the Alien Property Custodian, and in an amount greater than the amount sought to be recovered in this suit in equity.

6. It was further stipulated that valuing the Mark at the rate of exchange of  $17\frac{1}{2}$  cents per Mark, the claim of the plaintiffs against Delbrück, Schickler & Co. was an amount as shown in the following table depending on the dates within which interest should be calculated:

		With inter- est from April 6, 1917, to May 23, 1923	With inter- est from July 14, 1919, to May 23, 1923	With inter- est from July 3, 1921, to May 23, 1923
Delbrück, Schickler & Co.—	Claim as of April 6th, 1917			
Marks, 1,098.48, at $17\frac{1}{2}$ .....	\$192.23	.....	.....	.....
Offset .....	43.95	.....	.....	.....
Net .....	\$148.28	\$203.60	\$183.10	\$163.31

7. It was further stipulated that at the date of the trial May 23, [fol. 23] 1923, the value of the Mark was  $2/1000$  of a cent, and it is stipulated that on July 17, 1923, the date of the decree, the value

of the Mark was 1/25000 of one cent, and it is stipulated that the decree was made and judgment was entered for the payment of a sum based on a valuation of the mark at 17½ cents per mark.

Wm. Hayward, United States Attorney for the Southern District of New York, Solicitor for Thomas Woodnutt Miller, as Alien Property Custodian, and Frank White, as Treasurer, Van Vorst, Marshall & Smith, Solicitors for Benjamin Guinness et al.

[fol. 24] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT  
OF NEW YORK

E. 22-296

BENJAMIN GUINNESS et al., Copartners, Doing Business under the  
Firm Name and Style of Ladenburg, Thalmann & Co., Plaintiffs,  
against

THOMAS WOODNUTT MILLER, as Alien Property Custodian, and  
Frank White, as Treasurer of the United States, and Siegfried  
Pels and Albert Pels, as Copartners, Doing Business under the  
Firm Name and Style of Ludwig Nauen, German Citizens or Sub-  
jects, Defendants,

And Six Other Cases

OPINION—June 23, 1923

LEARNED HAND, D. J. :

Nobody questions that between April 6, 1917, and July 14, 1919, it was not lawful for an American to hold communication with a German, or for a German to communicate with an American. It is clear, therefore, that the creditors could not have received interest or the debtors have paid it. This is as true whether the Americans were debtors or creditors. It is, of course, obvious that this fact does not affect the profits of the debtor, who has had and enjoyed [fol. 25] the money meanwhile, or the damage of the creditor who has been without it. If the case were *res integra* it might be asked whether the inability of the debtor to pay was an adequate reason for changing the normal relations of the parties, especially if interest were payable *secundum tenorem*.

However, it was expressly ruled in *Brown vs. Hiatts*, 15 Wall. 177, that a Kansan need not pay a Virginian interest reserved in a mortgage for the period of the Civil War, on the ground that while communication was interrupted it was impossible for him to pay. That case stands unmodified and must be taken as the rule till the Supreme Court changes it. This is especially true now, since the Trading with the Enemy Act was enacted after careful preparation, and, in accordance with the usual presumption, must be understood

as adopting the decisions laid down in *pari materia* unless changed. I do not feel justified therefore in undertaking any independent inquiry on the subject.

The plaintiffs do indeed seek to distinguish, because here the debts were due before war broke out, while in *Brown vs. Hiatts*, *supra*, the debt fell due after April 27, 1861, when the blockade became effective. This is however of not the slightest moment, since in either case those considerations apply which were the basis of the rule. It is as little possible for the debtor to pay after war breaks out in one case as the other. Interest runs *de die in diem* and is due only for the delay in payment during the period in which it accrues. The fact that it once starts running cannot affect the debtor's inability to pay during the interdiction.

Nor does it make a difference whether the enemy have funds capable of attachment. He can hardly be charged with interest [fol. 26] because the creditor has not chosen to seize his goods. The reason for the rule is the supposed injustice of penalizing a debtor because he has not done an impossibility, and it applies quite as much whether or not his property was subject to proceedings in rem. Payment lay with the creditor, not him. Hence the rule must work either way.

An entirely different situation was presented in *Robertson vs. Miller*, 286 Fed. R., 503 (C. C. A., 2), which apparently recognized the rule in *Brown vs. Hiatts*, *supra*, though the case was not cited. There the enemy had property within the United States in the hands of an agent who had full power to act for him. This was taken to avoid the rule, because it was not unlawful for that agent to pay and the enemy was charged with his neglect.

The period of cesser will however not extend beyond July 14, 1919, when payments became lawful.

Settle decrees in accordance with the foregoing.

L. H., D. J.

[fol. 27]

IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION—June 28, 1923

LEARNED HAND, D. J.: This is a suit under Section Nine of the Trading with the Enemy Act by a citizen to recover a debt owed by a German on a stated account payable in marks. The sole question is whether the decree should be for the value in dollars of the marks when the account was stated, December 16, 1917, or for their value as of the date of the decree.

In the case of a tort committed in a foreign jurisdiction it is pretty clear that the judgment should be based on the exchange at the time [fol. 28] of the loss inflicted. In such cases we are familiar with the idea that his wrong imposes on the tort-feasor an obligation to indemnify his victim in money. A court of the sovereign where the

tort occurs enforces this obligation in the money of that sovereign regardless of its change in value, merely because those are the terms in which it is cast. When a court takes cognizance of a tort committed elsewhere, it is indeed sometimes said that it enforces the obligation arising under the law where the tort arises. And if this were true, it would seem to follow that the obligation should be discharged in the money of the sovereign in whose territory the tort occurred, and that the proper rule would be to adopt the rate of exchange as of the time of the judgment.

However, no court can enforce any law but that of its own sovereign, and when a suitor comes to a jurisdiction foreign to the place of the tort, he can only invoke an obligation recognized by that sovereign. A foreign sovereign under civilized law imposes an obligation of its own as nearly homologous as possible to that arising in the place where the tort occurs. But, since, apart, from specific performance, such an obligation must be discharged in the money of that sovereign, none other being available, the obligation so created can only be measured in that medium. The form of the obligation must therefore be to indemnify the victim for his loss in terms of the money of the foreign sovereign, and that obligation necessarily speaks as of the time when it arose, that is, when the loss occurred. Hence, a foreign court is as little concerned with the changes in the value of money in the territory where the tort arose, as are the courts of that territory itself. Each court is enforcing a different obligation, [fol. 29] imposed by different sovereigns, necessarily defined in the terms of its own money.

In case of torts this has been generally recognized as the proper result. *The Verdi*, 268 Fed. R., 908, *The Celia* (1921), 2 App. Cas., 344. The same considerations obviously apply to the breach of a contract resulting in unliquidated damages, at least if the resulting obligation to indemnify the promisee be regarded as imposed by law, and not as an alternative performance. And even if the second notion be accepted, the alternative performance is not to pay a fixed sum, but generally to indemnify the promisee. Such a case was *The Saigon Maru*, 267 Fed. R., 881, 893, where, however, exchange was fixed as of the date of the decree, a case with which I cannot go along.

The chief differences in the decisions arise in cases of contract to pay a fixed sum of money. Thus the same judge who decided *The Verdi*, supra, held in *The Hurona*, 268 Fed. R., 910, that in that case exchange should be taken as of the time of the decree. Some of the earlier cases are in accord, but the contrary was held in *Page vs. Levenson*, 281 Fed. R., 555, *Hoppe vs. Russo-Asiatic*, 235 N. Y. 37, *Société etc. vs. Cumming*, (1921) 3 K. B., 459. *Birge-Forbes Co. vs. Heve*, 251 U. S. 317, seems in fact to have involved the point, but can [fol. 30] scarcely be considered as an authority, at least in the Supreme Court.

There is in my judgment no sound basis for distinction between torts and contracts to pay fixed sums of money. The confusion arises from the assumption that payment after the due date is performance. But that appears to be untrue. A promise to pay a sum at a given day is not a promise to pay then or later. When the promisor de-

faults he fails to perform the only promise he has made, and his liability is as much a new creation of the law, as though he had failed to deliver a chattel. Or if it be insisted that his liability is an alternative performance, still that performance is not to pay at any later time, but generally to indemnify the promisee, subject of course to the limitations imposed by law. That liability is, as it seems to me, quite analogous to the obligation to indemnify raised upon a tort and the same reasoning should apply to it. A foreign sovereign will raise an equivalent obligation but couched in terms of its own money, because that alone it has the power to secure.

A different rule it is true might be applicable if specific performance were possible in such cases. No doubt a sovereign might insist upon the delivery of foreign money, if the occasion were proper. On obligations to pay money, this remedy does not, however, lie. All that can be done is to seize the promisor's property and sell it, a procedure which can result only in domestic money. To take the exchange as of the period of the judgment or decree is, therefore, to adopt a rule applicable only to specific performance, in a case where specific performance is not exacted. Since the loss is to be indemnified in the money of the sovereign where the Court sits, it has no alternative but to calculate it in terms of that money when the loss occurred, and to enforce its judgment regardless of variations in its [fol. 31] value between that time and the date of collection.

It must be confessed that the law is as yet not settled in the Federal Courts, but whatever be the true analysis, the indications are that the English and New York rule will eventually prevail. As this seems to me to accord with principle I shall adopt it till it is settled otherwise. In the case at bar, therefore, the proper exchange was that at the time when the account was stated and the balance became immediately payable.

Settle decree on notice.

L. H. D. J.

[fol. 32]

IN UNITED STATES DISTRICT COURT

[Title omitted]

FINAL DECREE—July 17, 1923

This cause came on to be heard at this Term, and was argued by counsel; and thereupon, and upon consideration thereof, it was

[fol. 33] Ordered, adjudged and decreed as follows, viz:

That the defendant Alien Property Custodian and defendant Treasurer of the United States pay to plaintiffs the sum of One hundred eighty-three dollars and ten cents (\$183.10) with interest from May 23, 1923, together with the costs of this suit, out of property of the defendant alien enemies conveyed, transferred, assigned, delivered or paid to or seized by the defendant Alien Property Custodian or any of his predecessors in office, and held by the defendant Alien



Property Custodian or by the defendant Treasurer of the United States in a trust entitled Delbrück, Schiekler & Co.

Learned Hand, United States District Judge.

[fol. 34]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—DEFENDANTS BELOW

Now come the defendants, Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States, and file the following assignment of errors upon which they will reply upon their appeal from the decree made by this honorable Court on the 17th day of July, 1923, in the above entitled cause.

First. That the Court erred in overruling the motion to dismiss the bill of complaint.

[fol. 35] Second. That the Court erred in not sustaining the motion to dismiss the bill of complaint.

Third. That the Court erred in holding that the decree in this cause should be for the value in dollars of the marks owing to the plaintiff when the account between the plaintiff and Delbrück, Schiekler & Company was stated on December 16, 1917.

Fourth. That the Court erred in not holding that the decree should be for the value in dollars as of the date of the decree, of the German marks to the plaintiffs.

Fifth. That the Court erred in holding that since the loss to the plaintiffs is to be indemnified in the money of the sovereign where the Court sits, the Court has no alternative but to calculate it in terms of that money when the loss occurred, and to enforce its judgment regardless of variation in its value between that time and the date of collection.

Sixth. That the Court erred in ordering, adjudging, and decreeing that the defendants, the Alien Property Custodian and the Treasurer of the United States pay to the plaintiffs the sum of one hundred eighty-three dollars and ten cents (\$183.10), with interest from May 23, 1923, together with costs of this suit out of the property of the defendant alien enemies, conveyed, transferred, assigned, delivered, or paid to or seized by the Alien Property Custodian or any of his predecessors in office, and held by the defendant, the Alien Property Custodian, or by the defendant, the Treasurer of the United States, in a trust entitled Delbrück Schiekler & Company.

[fol. 36] Seventh. That the Court erred in not adjudging, ordering and decreeing that the bill of complaint be dismissed.

All of which is respectfully submitted.

Dated New York, New York, the 6th day of September, 1923.

Wm. Hayward, United States Attorney, Solicitor for Thomas  
W. Miller, as Alien Property Custodian, and Frank White,  
as Treasurer of the United States.

[fol. 37] IN UNITED STATES DISTRICT COURT

Equity, 22308

[Title omitted]

#### ASSIGNMENTS OF ERROR—PLAINTIFFS BELOW

Now come the plaintiffs, Benjamin Guinness, Walter T. Rosen, Moritz Rosenthal, Sidney H. March, Rudolf Metz, Harry B. Lake, [fol. 38] and Paul Stamm and Anna Thalmann and Moritz Rosenthal as Trustees of the Estate of Ernst Thalmann, deceased, co-partners doing business under the firm name and style of Ladenburg, Thalmann & Co. and file the following assignment of errors upon which they will rely upon their appeal from the decree made by this Honorable Court on the 17th day of July, 1923, in the above entitled cause.

First. That the Court erred in holding that plaintiffs were not entitled to interest upon the principal of their claim from April 6, 1917, to July 14, 1919.

Second. That the Court erred in ordering, adjudging and decreeing that the defendants, the Alien Property Custodian and the Treasurer of the United States, pay to the plaintiffs the sum of One hundred eighty-three dollars and ten cents (\$183.10) with interest from May 23, 1923, in lieu of the sum of Two hundred and three dollars and sixty-cents (\$203.60) with interest from May 23, 1923, together with costs of this suit out of the property of the defendants, alien enemies, conveyed, transferred, assigned, delivered or paid to or seized by the Alien Property Custodian or any of his predecessors in office, and held by the defendant the Alien Property Custodian or by the defendant, the Treasurer of the United States in a trust entitled Dulbrück, Schickler & Co., all of which is respectfully submitted.

Dated, New York, N. Y., this 30th day of September, 1923.

Van Vorst, Marshall & Smith, Solicitors for Benjamin Guinness et al., Plaintiffs.

[fol. 39]

## IN UNITED STATES DISTRICT COURT

Eq., 22308

[Title omitted]

## NOTICE OF APPEAL—DEFENDANTS BELOW

To the Clerk of the United States District Court for the Southern District of New York; Messrs. Van Vorst, Marshall & Smith, 25 Broad Street, Borough of Manhattan, New York, Solicitors for Plaintiffs:

Please take notice that Thomas W. Miller, as Alien Property Custodian [fol. 40] todian and Frank White, as Treasurer of the United States of America, do hereby appeal to the Circuit Court of Appeals for the Second Circuit from the final decree made and entered on the 17th day of July, 1923, and from each and every part of said decree.

Dated New York, New York, Sept. 6, 1923.

Wm. Hayward, United States Attorney for the Southern District of New York, Solicitor for Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States.

[fol. 41]

## IN UNITED STATES DISTRICT COURT

Equity, 22308

[Title omitted]

## NOTICE OF APPEAL—PLAINTIFFS BELOW

To the Clerk of the United States District Court for the Southern District of New York; Hon. William Hayward, United States [fol. 42] Attorney for the Southern District of New York, Solicitor for Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States:

Please take notice that Benjamin Guinness, Walter T. Rosen, Moritz Rosenthal, Sidney H. March, Rudolf Metz, Harry B. Lake and Paul Stamm, and Anna Thalmann and Moritz Rosenthal as Trustees of the Estate of Ernst Thalmann, deceased, copartners doing business under the firm name and style of Ladenburg, Thalmann & Co., do hereby appeal to the Circuit Court of Appeals for the Second Circuit from the final decree made and entered on the 17th day of July, 1923 in so far as the same adjudges that the defendants shall pay to the plaintiffs the sum of One hundred eighty-three dollars and ten cents (\$183.10) with interest from May 23,

1923, as therein provided, instead of the sum of Two hundred and three dollars and sixty cents (\$203.60), the latter sum including interest from April 6, 1917 to July 14, 1919, which interest is not included in the sum of One hundred eighty-three dollars and ten cents (\$183.10).

Dated, New York, N. Y., September 30, 1923.

Van Vorst, Marshall & Smith, Solicitors for Benjamin Guinness et al.

[fol. 43] IN UNITED STATES DISTRICT COURT

Eq. 22308

[Title omitted]

PETITION FOR APPEAL OF DEFENDANTS BELOW

Now come the defendants, Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States, by their solicitor William Hayward, Esquire, United States Attorney for the Southern District of New York, and conceiving themselves aggrieved by the decree made and entered on the 17th day of July, 1923, in the above entitled cause, do hereby appeal from the said [fol. 44] order and decree to the United States Circuit Court of Appeals for the Second Circuit for the reasons specified in the Assignment of Errors which is filed herewith and they pray that this appeal may be allowed and that a citation be issued as provided by law and that a transcript of the record, proceedings and papers upon which said order and decree were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

Wm. Hayward, United States Attorney for the Southern District of New York, Solicitor for Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States.

Dated New York, September 6, 1923.

[fol. 45] IN UNITED STATES DISTRICT COURT

Equity, 22308

[Title omitted]

PETITION FOR APPEAL OF PLAINTIFFS BELOW

Now come the plaintiffs, Benjamin Guinness, Walter T. Rosen, Moritz Rosenthal, Sidney H. March, Rudolf Metz, Harry B. Lake

[fol. 46] and Paul Stamm and Anna Thalmann and Moritz Rosenthal as Trustees of the Estate of Ernst Thalmann, deceased, co-partners doing business under the firm name and style of Ladenburg, Thalmann & Co. by their solicitors, Van Vorst, Marshall & Smith and conceiving themselves aggrieved by the decree made and entered on the 17th day of July, 1923 in the above entitled cause, do *hereby appeal from the said order and decree* to the United States Circuit Court of Appeals for the Second Circuit for the reasons specified in the assignment of errors which is filed herewith, and they pray that this appeal may be allowed, and that a citation be issued as provided by law, and that a transcript of the record, proceedings and papers upon which said order and decree were made duly authenticated may be sent to the United States Circuit Court of Appeals for the Second Circuit.

Dated New York, N. Y., September 30, 1923.

Van Vorst, Marshall & Smith, Solicitors for Plaintiffs.

[fol. 47]

IN UNITED STATES DISTRICT COURT

Equity, 22308

[Title omitted]

#### ORDER ALLOWING APPEAL OF DEFENDANTS BELOW

Upon reading the petition of Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States, dated New York, New York, September 6, 1923, for the allowance of an appeal, and on consideration of the Assignment of Errors presented therewith, is

Ordered that the appeal as prayed for be and the same is hereby [fol. 48] allowed and that a certified copy of the record and of proceedings be forthwith transmitted to the Circuit Court of Appeals for the Second Circuit; and it appearing that this appeal is taken by direction of a department of the Government, to wit, the Department of Justice, it is further

Ordered that the said appeal shall operate as a supersedeas and that no bond, obligation or security shall be required from the appellants, Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States, either to prosecute the same or to answer in damages and costs.

Dated New York, New York, September 6, 1923.

Manton, United States Circuit Judge.



[fol. 49]

## IN UNITED STATES DISTRICT COURT

Equity, 22308

[Title omitted]

## ORDER ALLOWING APPEAL OF PLAINTIFFS BELOW

Upon reading the petition of Benjamin Guinness, Walter T. Rosen, Moritz Rosenthal, Sidney H. March, Rudolf Metz, Harry B. Lake [fol. 50] and Paul Stamm and Anna Thalmann and Moritz Rosenthal as Trustees of the Estate of Ernst Thalmann, deceased, copartners doing business under the firm name and style of Ladenburg, Thalmann & Co. dated New York, N. Y., September 30, 1923 for the allowance of an appeal, and on consideration of the assignment of errors presented therewith, it is

Ordered that the appeal as prayed for be, and the same hereby is allowed, and that a certified copy of the record and all proceedings be forthwith transmitted to the Circuit Court of Appeals for the Second Circuit, and upon the subjoined consent, it is

Further ordered that no bond, application, or security shall be required from the appellants, Benjamin Guinness, Walter T. Rosen, Moritz Rosenthal, Sidney H. March, Rudolf Metz, Harry B. Lake and Paul Stamm, and Anna Thalmann and Moritz Rosenthal, as Trustees of the Estate of Ernst Thalmann, deceased, copartners doing business under the firm name and style of Ladenburg Thalmann & Co. either to prosecute the same or to answer in damages and costs.

Dated New York, N. Y., October 5, 1923.

Hand, United States District Judge.

[fol. 51] Thomas W. Miller, as Alien Property Custodian, and Frank White as Treasurer of the United States hereby consent to the entry of the foregoing order, and consent that no bond, application or security shall be required from the appellants, Benjamin Guinness, Walter T. Rosen, Moritz Rosenthal, Sidney H. March, Rudolf Metz, Harry B. Lake and Paul Stamm, and Anna Thalmann and Moritz Rosenthal as Trustees of the Estate of Ernst Thalmann, deceased, copartners doing business under the firm name and style of Ladenburg, Thalmann & Co. either to prosecute the appeal or to answer in damages and costs.

Wm. Hayward, United States Attorney for the Southern District of New York, Solicitor for Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States.

[fol. 52] CITATION—In usual form; omitted in printing.

[fols. 53 & 54] CITATION—In usual form; omitted in printing.

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[fol. 55] IN UNITED STATES DISTRICT COURT

Eq., 22308

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby stipulated and agreed, that the foregoing is a true [fol 56] transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated November 14th, 1923.

Van Vorst, Marshall & Smith, Solicitors for Complainant.  
Wm. Hayward, United States Attorney, Solicitor for Defendants Miller and White.

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[fol. 57] IN UNITED STATES DISTRICT COURT

Eq. 22-308

[Title omitted]

CLERK'S CERTIFICATE

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do [fol. 58] hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 15th day of November in the year of our Lord one thousand nine hundred and twenty-three and of the Independence of the said United States the one hundred and forty-eighth.

Alex. Gilchrist, Jr., Clerk.

[fol. 59] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE  
SECOND CIRCUIT, OCTOBER TERM, 1923

Argued February 14, 1924. Decided April 14, 1924

No. 236

BENJAMIN GUINNESS, WALTER T. ROSEN, MORITZ ROSENTHAL, SIDNEY H. March, Rudolph Metz and Harry B. Lake, and Anna Thalmann and Moritz Rosenthal, as Trustees of the Estate of Ernst Thalmann, Deceased, Copartners, Doing Business under the Firm Name and Style of Ladenburg, Thalmann & Company, Plaintiffs-Appellants and Appellees,

v.

THOMAS W. MILLER, as Alien Property Custodian; FRANK WHITE, as Treasurer of the United States, and Carl Joerger, Gustaf Ratjen, Ludwig Korte, Arthur Freiherr von Schickler, Margarete Graf von Pourtales, Estate of Ludwig Delbruck, Deceased, Copartners, Doing Business under the Firm Name and Style of Delbruck, Schickler & Company, Defendants-Appellants and Appellees.

Appeal from the District Court of the United States for the Southern District of New York

Before Rogers, Manton, and Mayer, Circuit Judges

[fol. 60] Appeal from a decree of the United States District Court for the Southern District of New York, ordering the Alien Property Custodian and the Treasurer of the United States to pay out of funds seized, a sum of money in payment of a debt of an alien. Both plaintiffs and defendants appeal.

Van Vorst, Siegel & Smith, Esqs., Solicitors for Plaintiffs. Alexander B. Siegel, Esq., of Counsel.

William Hayward, Esq., United States Attorney.

Dean Hull Stanley, Esq., A. R. Johnson, Jr., Esq., Special Assistants, Counsel for Defendants.

#### OPINION

MANTON, Circuit Judge:

This suit is instituted under §9 of the Trading with the Enemy Act (40 Stat., 411), as amended, to recover from the Alien Property Custodian or the Treasurer of the United States, the property of Delbruck, Schickler & Company for an indebtedness admitted to be due on an account stated as of December 31, 1916. On April 6, 1917, Delbruck, Schickler & Company were indebted to the plaintiffs in the sum of 1,079.35 marks as of January 1, 1916, and this was acknowledged by that firm when the account was stated December

31, 1916. Thereafter, there were no dealings between the parties. It is conceded that there was a separate indebtedness due to the defendant Delbruck, Schickler & Company of \$35.35. Section 9 of the Trading with the Enemy Act authorizes the present proceeding.

The only questions presented here are law questions, since the facts have been stipulated. They are, (1) What rate of exchange should the court adopt in calculating the amount of the defendants' indebted-[fol. 61] ness in marks into money of the United States? (2) Was the plaintiff entitled to interest upon the indebtedness owing by Delbruck, Schickler & Company during the war period between April 6, 1917, and July 14, 1919—that is, from the date of the entry of the United States into the world war to the date of the issuance of the general license by the War Trade Board permitting communication and commercial transactions between citizens of the United States and citizens of Germany? The plaintiffs contend the rate of exchange to be that which existed on the date of the account stated—the date of the breach of contract—whereas the defendants contend for the date as of the date of the entry of the final decree. It is stipulated that on December 31, 1916, the value of the mark was  $17\frac{1}{2}$ c. U. S. currency, and on the date of the decree, it was one-twenty-five thousandths of a cent. The Trading with the Enemy Act provides:

"Section 9 (a) That any person not an enemy or ally of enemy \* \* \* to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, may file with the said Custodian a notice of his claim under oath and in such form and containing such particulars as the said Custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled; \* \* \* If the President shall not so order within sixty days after the filing of such application, or if the claimant shall have filed [fol. 62] the notice as above required, and shall have made no application to the President, said claimant may at any time, before the expiration of thirty months after the end of the war institute a suit in equity \* \* \* to establish the \* \* \* debt so claimed, and if so established, the Court shall order the payment, conveyance, transfer, assignment or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the Court shall determine said claimant is entitled; \* \* \*

(c) \* \* \* nor in any event shall a debt be allowed under this Section unless it was owing to and owned by the claimant prior to October 6, 1917."

It is a pre-war debt that can be recovered under the Act, and that debt must necessarily be measured in dollars. Marks could not be

paid by the Alien Property Custodian, either on order of the President or of the court. The statute must be read in the light of co-existing and collateral provisions of law and in the absence of any statute law or common law requiring a different conclusion, the correct inference from the provisions of the Trading with the Enemy Act is that the value of pre-war debts recoverable under the Act is to be taken as of their pre-war value. Any other conclusion would cause confusion and a lack of uniformity in the application of its provisions. It would distort the statute under which the suit is brought, to hold that the amount of the debt recoverable thereunder was available depending upon the date of judgment. Such a construction would nullify that portion of the statute which permits the President to order the payment of the debt without a judgment.

In *Birge-Forbes Co. v. Heye*, 248 Fed., 636, aff'd 251 U. S., 317, a contention was presented as to whether the mark should be computed at its normal value or at the value which it had at the time of the trial and the court said that the purpose of the judgment was to make the plaintiff pay for the amount which he paid out in discharging the obligations of his principals, and held that the evidence failing to disclose any depreciation of the German mark at the time of this payment, the assumption should be that the value of the mark was at that time the normal value and that the judgment should be predicated upon such value. The Supreme Court affirmed this conclusion. The rate of exchange on the date of the inquiry or breach of contract is the measure for transferring the indebtedness into the United States currency. This principle met with the approval of the Circuit Court of Appeals for the Fifth Circuit in *Wormser Bros. v. G. Marroquin & Co.* (249 Fed., 428), and of Judge Rose in *Page v. Levenson* (281 Fed., 555); and of the highest court of the State of New York in *Hoppe v. Russo-Asiatic Bank* (235 N. Y., 37); in Illinois, in *Simonoff v. Granite City National Bank* (279 Ill., 248); in New Jersey, in *Katcher v. American Express Co.* (94 N. J. L., 165). The House of Lords of England has reached the same conclusion. See *S. S. Celia v. S. S. Vulturno* (1921), 2 A. C., 544; *British-American Continental Bank, Ltd., in re Goldzieher and Penso's claim* (1922), 2 Ch., 575, and *Uliendahl v. Pankhurst Wright & Co.*, K. B. Div., July 6, 1923, 39 Times L. R., 628. We regard this rule as applicable whether the action be in contract or in tort. Primarily the plaintiff is entitled to recover a sum expressed in foreign money. In theory, he is to be made whole for the injury suffered at the time. The judgment which grants him the relief should express in our currency the rate of exchange prevailing at the date of the breach of the contract or at the date of the commission of the tort. We see no sound reason for a different rule to be applicable, in the administration of justice to an injured claimant, when his right of recovery is through an action in tort rather than in a case [fol. 64] of contract. Such is the rule announced in the authorities above referred to.

We are referred to various provisions of the Treaty of Versailles and the Treaty of Peace with Germany proclaimed November 14,

1921, as bearing on this subject, but we are of the opinion that the specific provisions of the rate of exchange in the Treaty of Versailles and the reference to that treaty in the separate treaty of peace between Germany and the United States, do not detract from the conclusions reached above. It is the contention of the claimants that subdiv. 14 of the Annex to Section IV of Part X of the Treaty of Versailles, which is included in the treaty between the United States and Germany, makes provision for the rate of exchange and the rate of interest which is to be used in settling claims such as the plaintiffs' in this action. It provides:

"The provisions of Article 297 and this Annex, relating to property, rights and interests in an enemy country, and the proceeds of the liquidation thereof, apply to debts, credits and accounts, Section III regulating only the method of payment.

In the settlement of matters provided for in Article 297 between Germany and the Allied or Associated States, their colonies or protectorates, or any one of the British Dominions or India, in respect of any of which a declaration shall not have been made that they adopt Section III, and between their respective nationals, the provisions of Section III respecting the currency in which payment is to be made and the rate of exchange and of interest shall apply unless the Government of the Allied or Associated Power concerned shall within six months of the coming into force of the present Treaty notify Germany that the said provisions are not to be applied."

[fol. 65] The United States has not made a declaration adopting Section III. It has given no notice rejecting the provisions of Section III respecting the currency in which payments of debts are to be made, and the rate of exchange and the rate of interest. The specific provisions as to the rate of exchange in the Treaty of Versailles are to be found in subdiv. D of Article 296. This is a part of Section III. Article 296 makes provision for the settlement of debts payable before the war and due by a national of one of the contracting parties residing within its territory, to a national of an opposite power residing within its territory. The provision makes for the payment and collection of such debts through a clearing house which is established. The rate of exchange provided is that rate which is fixed in the settlement of debts in such clearing house. Article 296 does not apply as between Germany on the one hand and any of the alien or associated powers unless within a period of one month from the deposit of the ratification of the present treaty, a notice to that effect is given to Germany by the government of the power adopting the provisions. It is conceded no such notice was ever given to Germany by the United States that it adopted the provisions of Article 296. Therefore we see no reason why the provisions of Article 296 apply to the United States as no debts existing between the nationals of the United States and the nationals of Germany are settled by the Clearing House. Subdivision 3 of the Annex to Article 296, makes provision that the parties to the clearing

house arrangement will prohibit within their territory, all legal process relating to the payment of enemy debts except in accordance with the provisions of the Annex. It is not contended here that Article 296 is binding upon the United States. It is said that subdiv. 14 to Section IV of Part X makes provision as to the rate of exchange to be used and interest to be allowed upon the claims other than those provided for in the Clearing House. There is a specific reference in [fol. 66] subdiv. 14 that

"The provisions of Article 297 and this Annex, relating to property, rights and interests in an enemy country, and the proceeds of the liquidation thereof, apply to debts, credits and accounts, Section III regulating only the method of payment."

Article 297 has no reference to payment of debts of Germans due an American. In part of Section IV of Article 297 which is headed "Property Rights and Interest," provision is made for dealing with and liquidation of property belonging to nationals of allied and associated powers who were in Germany during the war or property of Germans which was within the territory of the allied and associated powers during the war. It is true that subdiv. 14 of the Annex to Section IV includes debts, credits and accounts, but that is a provision under Article 297 which does not deal with the payment of debts between nationals of various powers, shall include within its scope not only tangible property within the various countries, but also intangible. Credits are made property within the meaning of Article 297 between Germany and the associated states and between their respective nationals. The provision of Section III respecting currency in which payment is to be made and the rate of exchange and interest shall apply unless the governments of the allied and associated powers concerned shall, within six months of the coming into force of the present treaty, notify Germany that such provisions are not to be applied. Subdiv. 14 provides that on the settlement of matters provided for in Article 297, the provisions as to the rate of exchange and interest provided for in Section III shall apply. And Article 297 provides for the liquidation by the allied and associated powers, of all property rights and interest belonging, at the time of the coming into force, of the present treaty to German nationals and companies controlled by them within the territories of the allied and [fol. 67] associated powers. Thus, the provisions as to the rate of interest and exchange provided for in Section III are made applicable to Article 297 by subdiv. 14 of the Annex to Section IV, namely, in the instance of the liquidation of properties of Germans within the United States. Subdiv. E of Article 297 provides that nationals of the allied and associated powers shall be entitled to compensation with respect to damage or injury inflicted upon their property rights or interests including any company or association in which they are interested in German territory as it existed on August 1, 1914. This is another instance where the rate of exchange and interest applied, namely, where Germany liquidates the property of American nationals where the property was in Germany as of August 1, 1914,

Germany must use the rate of exchange and interest provided for in Section III. We regard these provisions of Article 297 as having no application to a suit under Section 9 of the Trading with the Enemy Act when the purpose of the suit is to collect a debt owing to an American citizen out of the property of an enemy in the United States where the property has been seized by the Alien Property Custodian and now held by the Treasurer of the United States. The rate of exchange is in no way provided for if such procedure is instituted under Article 297 of the Treaty of Versailles.

The treaty of peace with Germany of which ratifications were exchanged on November 11, 1921, contains the following:

"Article I. Germany undertakes to accord to the United States, and the United States shall have and enjoy, all the rights, privileges, indemnities, reparations or advantages specified in the aforesaid Joint Resolution of the Congress of the United States of July 2, 1921, including all the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles which the United States shall fully enjoy notwithstanding the fact that such Treaty has not been ratified by the United States.

[fol. 68] Article II. With a view to defining more particularly the obligations of Germany under the foregoing Article with respect to certain provisions in the Treaty of Versailles, it is understood and agreed between the High Contracting Parties:

(1) That the rights and advantages stipulated in that Treaty for the benefit of the United States, which it is intended the United States shall have and enjoy, are those defined in Section 1, of Part IV, and Parts V, VI, VIII, IX, X, XI, XII, XIV and XV.

The United States in availing itself of the rights and advantages stipulated in the provisions of that treaty mentioned in this paragraph will do so in a manner consistent with the rights accorded to Germany under such provisions."

By a reservation, Congress on October 18, 1921, as a part of the Resolution of Ratification of the German Treaty, provided that.

"the rights and advantages which the United States is entitled to have and enjoy under this Treaty embraced the rights and advantages of nationals of the United States specified in the Joint Resolution or in the provisions of the Treaty of Versailles, to which this treaty refers."

Thus all the rights and advantages stipulated in the Versailles Treaty in Part X are reserved to the United States and under the Resolution of Ratification, to its nationals. If anything, the Treaty of Versailles entitled citizens of every allied or associated power which ratified to have pre-war debts owing to them by German nationals, paid at the pre-war rate of exchange. The provisions of the treaty had no application to the questions of either rate of exchange or interest.



The plaintiff is not entitled to recover interest upon this debt from the period of April 6, 1917, to July 14, 1919. During this period [fol. 69] there was a state of war between Germany and the United States. There was a suspension of interest upon obligations existing between citizens of hostile belligerent countries under the well recognized rules of law. At common law, interest is suspended during the period of war (*Brown v. Hiatts*, 82 U. S. 177). The reason has often been stated. It is that communications between citizens of hostile belligerents have become illegal and it becomes legally impossible for the debtor to pay his debt or the creditor to receive it. Interest is the charge for the withholding of payment of a debt and it would be inequitable to make the charge when it is legally impossible to pay the debt. This debt was ascertained and agreed upon. It was not paid because payment was impossible during the period of the war. There is no provision in the Trading with the Enemy Act which materially changes this rule of law. And by Section 7 (c) of the Trading with the Enemy Act, the President may require the payment to him of the debt owing to the enemy. In such an event, whether or not the debt of the enemy may be paid from the funds in the hands of the Alien Property Custodian depends upon the eventuality that the President shall so require. Under Section 7 (d) a debtor is permitted to pay his debt to the Alien Property Custodian only, but this must be with the consent of the President. Thus, it appears that there is not an unrestricted privilege to pay a debt. It may not be paid in any event even if the debtor may so desire. In order to overcome this rule, it must appear that there was an unrestricted ability on the part of the enemy to discharge his debt. Such was the case against the Alien Property Custodian in *Robertson v. Miller* (286 Fed., 503). There this court held that interest ran because the enemy had an agent in this country who was in possession of funds and had authority to pay the debts during the period of the war.

We find no error in the conclusion below. Decree affirmed.

[fols. 70 & 71] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

Appeal from the District Court of the United States for the Southern  
District of New York

JUDGMENT—April 21, 1924

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed.

H. W. R.  
M. T. M.  
J. M. M.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

[fol. 72] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

# PETITION FOR REHEARING

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Your petitioners, Benjamin Guinness, Walter T. Rosen, Moritz Rosenthal, Sidney H. March, Rudolph Metz and Harry B. Lake and Anna Thalmann and Moritz Rosenthal, as Trustees of the Estate of Ernst Thalmann, deceased, copartners doing business under the firm [fol. 73] name and style of Ladenburg, Thalmann & Company, the plaintiffs-appellants and appellees upon the appeal in the cause above-entitled humbly petition for a rehearing upon the said appeal and for cause show:

## I

Sections of Article 297 of the Versailles Treaty, not adverted to by the Court in its Opinion, specifically deal with claims made upon enemy property seized by the Alien Property Custodian.

In the Opinion of the Court, after a discussion of the effect of the Treaty between the United States and Germany appears the following:

"We regard these provisions of Article 297 as having no application to a suit under Section 9 of the Trading with the Enemy Act when the purpose of the suit is to collect a debt owing to an American citizen out of the property of an enemy in the United States where the property has been seized by the Alien Property Custodian and now held by the Treasurer of the United States. The rate of exchange is in no way provided for if such procedure is instituted under Article 297 of the Treaty of Versailles."

In opposition to this view we refer to the following provisions of Article 297 and the Annex thereto, which are not referred to in the Opinion of the Court, and which were not brought to the attention of the Court with sufficient definiteness by counsel upon either side. There are underlined, in lieu of extended argument, the portions of the sentences quoted which seem to us to be directly contrary to the conclusion reached by the Court.

Subdivision (2) of paragraph (h) of Article 297 provides as follows [fol. 74] (the omitted portion, dealing with the obligation of Germany to restore property to the owners thereof):

"(2) As regards Powers not adopting Section III and the Annex thereto, \* \* \* the proceeds of the property, rights and inter-

ests, and the cash assets, of German nationals received by an Allied or Associated Power shall be subject to disposal by such Power in accordance with its laws and regulations and may be applied in payment of the claims and debts defined by this Article or paragraph 4 of the Annex hereto."

Paragraph 4 of the Annex to Article 297 is as follows:

"All property, rights and interests of German nationals within the territory of any Allied or Associated Power and the net proceeds of their sale, liquidation or other dealing therewith may be charged by that Allied or Associated Power in the first place with payment of amounts due in respect of claims by the nationals of that Allied or Associated Power with regard to their property, rights and interests, including companies and associations in which they are interested, in German territory, or debts owing to them by German nationals, and with payment of claims growing out of acts committed by the German Government or by any German authorities since July 31, 1914, and before that Allied or Associated Power entered into the war. The amount of such claims" (and this obviously refers to the "claims" for damages last above referred to) "may be assessed by an arbitrator appointed by Mr. Gustave Ador, if he is willing, or if no such appointment is made by him, by an arbitrator appointed by the Mixed Arbitral Tribunal provided for in Section VI."

Subdivision 14 of the Annex, fixing the rate of exchange and of interest, to which the Court refers, does indeed affect only those cases which are covered by Article 297 and the Annex thereto; but Article 297 does specifically cover the payment of claims made by a national [fol. 75] of an Allied or Associated Power against a national of Germany out of funds seized by the Government of an Allied or Associated Power which has failed to adopt Section III, and has thus failed to submit the seized property to the action of the International Clearing Office.

It is not our contention that the Treaty affects the rights existing between Germans and Americans in respect of prewar debts except to the extent that these rights are asserted against German property seized by the Alien Property Custodian; as to those rights we think that the Treaty clearly affects them, and would clearly be enforced in respect of them if the Versailles Treaty had been ratified by the Senate of the United States, and although that Treaty has not been ratified as a whole, these particular provisions have been incorporated into the law of the land by the express terms of the separate Treaty of Peace quoted in the Court's opinion.

We should all remember, in construing the Versailles Treaty, that the United States is named as a party thereto; that its Commissioners, headed by the President, had a guiding part in framing its provisions; and that nothing was further from the minds of either our Commissioners or of those of any other allied or associated Power than that the Treaty would not be ratified by the Senate.

Its provisions were, therefore, drafted to have effect and intended to have effect in the United States.

It is very recent history that account was taken of the American desire that property seized by our Government should not be thrown into the international pool provided in Section III of Part X, and that Germany was made, therefore, to recognize the right of the United States Government to retain the private property of its nationals which had been seized, and the right to have the same subjected to the payment of the debts owing by its citizens to ours; and [fol. 76] this was done by Section IV, which covers the case of countries which do not elect to join the international pool, and the Section, in Article 297 and its Annex, specifically provides for what our citizens may be entitled to receive out of such seized funds, and that no German could object thereto.

In construing this Treaty, it is respectfully submitted that it must be construed as if it had been ratified by the Senate, because that is what was in the minds of the parties when they drafted it. If it had been so ratified, and if it were now the law of the land, could there be any question, in view of the provisions therefrom which we have just quoted, that it applied to this case?

The Versailles Treaty never became the law of the land through its own ratification; but, as appears from the opinion of the Court in Section 297 of the Versailles Treaty, through its incorporation by reference in the separate Treaty of Peace, and through the terms of the Senate's resolution of ratification, has become and now is a part of the law of the land.

## II

The careful opinion of the Court, by not referring to the absolutely strictly relevant provisions, indicates that they were not within the scope of its attention.

The Court's attention was not specifically drawn to these sections by counsel for the plaintiffs-appellants and appellees because the Government's position in respect of the Treaty was not fully appreciated by them, that position having been stated in a supplemental memorandum submitted by the Government ten days after the argument. The Government did, however, quote these particular provisions, but laid no stress thereon, and it is believed that they have been overlooked [fol. 77] looked by the Court, since in the Court's carefully worked out opinion, no reference to these particular provisions, which seem to us to be the all important ones, has been made.

## III

Of course, if these contentions be correct, then interest will be allowed during the period of the war in an action brought under Section 9 of the Trading with the Enemy Act, although the Treaty does not otherwise affect the rights existing between Germans and Americans; because Paragraph 14 of the Annex specifically provides for the allowance of interest during war on all claims within the embrace of Article 297. We think that this Honorable Court overlooked the provisions which we have quoted, and which seem clear

to bring claims against seized enemy property within the embrace of the provisions of that Article.

Wherefore, your petitioners submitting respectfully to this Honorable Court that its finding that interest was not allowable for the period of the war, was occasioned by overlooking the sections of Article 297 and the Annex thereto to which reference is hereinabove made, respectfully pray that this Honorable Court grant a rehearing herein to the end that upon such rehearing the judgment of the District Court of the United States for the Southern District of New York be modified to allow such interest, if this Honorable Court shall be so disposed, and your petitioners will as in duty bound ever pray, etc.

Benjamin Guinness et al., Copartners, Doing Business under the Firm Name and Style of Ladenburg, Thalmann & Co.,  
Plaintiffs-Appellants and Appellees, Petitioners.

[fol. 78] Jurat showing the foregoing was duly sworn to by Harry B. Lake omitted in printing.

[fols. 79 & 80] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER OVERRULING PETITION FOR REHEARING—May 3, 1924

A petition for a rehearing having been filed herein by counsel for the Plaintiffs;

Upon consideration thereof it is

Ordered that said petition be and hereby is denied.

M. T. M.

J. M. M.

[fol. 81] IN UNITED STATES CIRCUIT COURT OF APPEALS

CLERK'S CERTIFICATE

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 80 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Benjamin Guinness et al., Trustees, etc., Plaintiffs-Appellants, against Thomas W. Miller as Alien Property Custodian, etc., Defendants-Appellants, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 24th day of May in the year of our Lord One Thousand Nine Hundred and twenty-four

and of the Independence of the said United States the One Hundred and forty-eighth.

Wm. Parkin, Clerk. (Seal of United States Circuit Court of Appeals, Second Circuit.)

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[fol. 82] IN SUPREME COURT OF THE UNITED STATES

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

ORDER GRANTING PETITION FOR CERTIORARI—Filed June 9, 1924

On consideration of the petition for a writ of certiorari herein to the United States Circuit Court of Appeals for the Second Circuit, and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

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[fol. 83] IN SUPREME COURT OF THE UNITED STATES

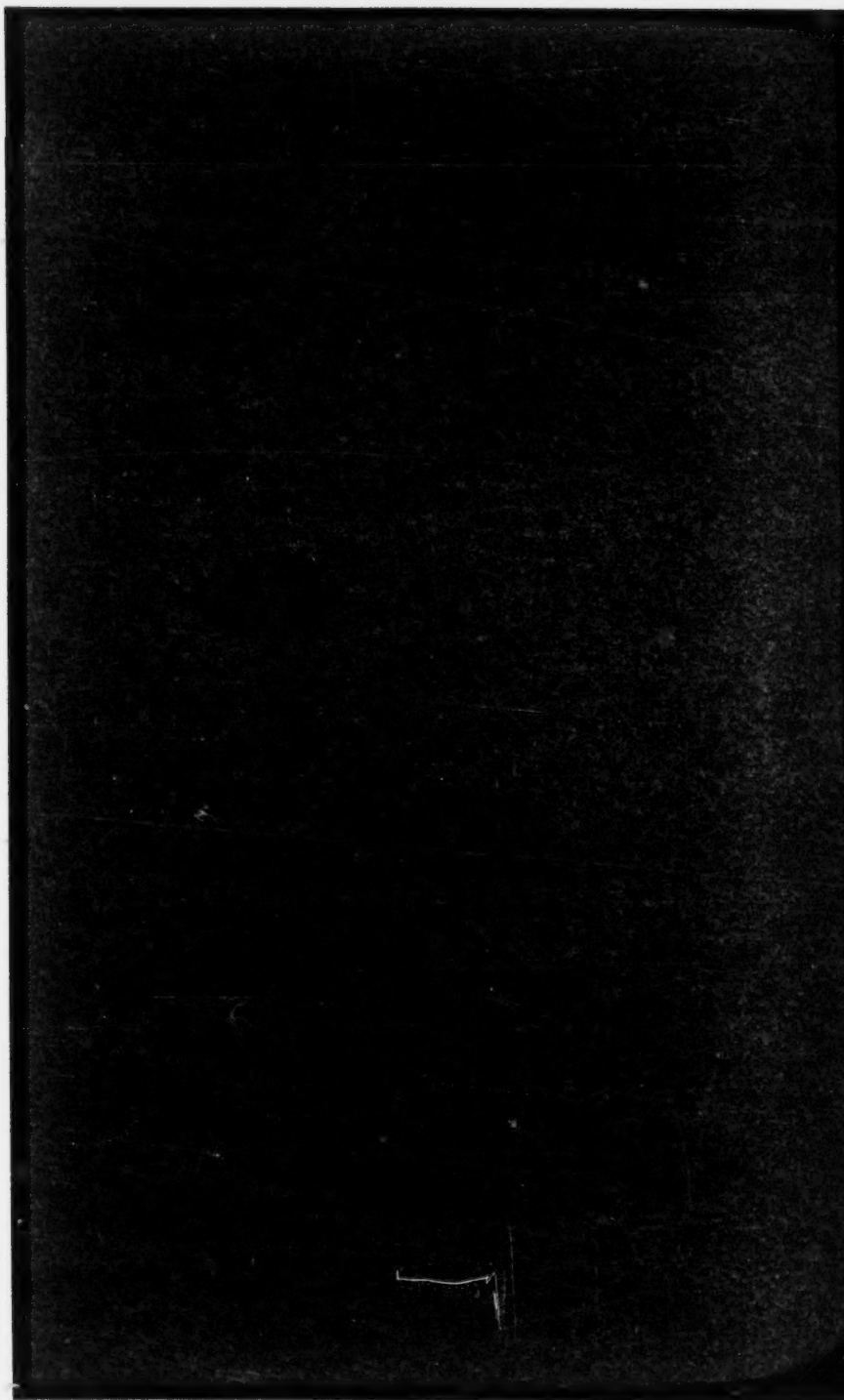
On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

ORDER GRANTING PETITION FOR CERTIORARI—Filed June 9, 1924

On consideration of the petition for a writ of certiorari herein to the United States Circuit Court of Appeals for the Second Circuit, and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.







# In the Supreme Court of the United States

OCTOBER TERM, 1923

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THOMAS W. MILLER, AS ALIEN PROPERTY  
Custodian, and Frank White, as Treas-  
urer of the United States, Petitioners,

*v.*

BENJAMIN GUINNESS, WALTER T. ROSEN,  
Moritz Rosenthal, Sidney H. March,  
Rudolph Metz, and Harry B. Lake, and } No.  
Anna Thalmann and Moritz Rosenthal,  
as trustees of the Estate of Ernst Thal-  
mann, deceased, copartners doing busi-  
ness under the firm name and style of  
Ladenburg, Thalmann & Company, re-  
spondents

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEC- OND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

The Solicitor General on behalf of Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States of America, petitioners, prays that a writ of certiorari issue in accordance with the provisions of Section 251 of the Judicial Code, to review the decree of the Circuit Court of Appeals for the Second Circuit, entered in

this case on April 21, 1924, which affirmed a decree of the District Court of the United States for the Southern District of New York in favor of the respondents and against the petitioners.

#### QUESTION PRESENTED

Where a debt is owing to a person in currency of a foreign country and suit is brought in a court in the United States to recover the amount of the debt, what rate of exchange should be used by the Court in transmuting into money of the United States for the purpose of entering a decree or judgment the amount of the debt which is expressed in foreign currency?

#### STATEMENT OF THE CASE

On April 6, 1917, the date of the outbreak of war between the United States of America and Germany, Delbruck, Schickler & Company, a German firm domiciled in Germany, was indebted to the respondents in the sum of M. 1,079.35, as shown by an account stated, dated December 31, 1916, and duly acknowledged by Delbruck, Schickler & Company.

The respondents conceded a separate indebtedness to Delbruck, Schickler & Company of \$35.35. On or about December 1, 1921, the respondents instituted a suit in equity under the terms and provisions of Section 9 of the Trading with the Enemy Act, 41 Stat. at L. 911, in which suit the respondents sought to have paid to them the amount of said debt out of money or other property in the custody of these petitioners which had been seized as the money

or other property of Delbruck, Schickler & Company, which had become an enemy under the provisions of the Trading with the Enemy Act.

The only questions which arose in the District Court were questions of law, namely, (1) what rate of exchange should the Court adopt in transmuting the amount of the enemies' indebtedness in marks into money of the United States, and (2) were the respondents entitled to interest upon the indebtedness owing by Delbruck, Schickler & Company, during the period between April 6, 1917, and July 14, 1919, the first date being the date of the outbreak of war between the United States of America and Germany, and the second date being the date of the issuance of the general license by the War Trade Board permitting communication and commercial transactions between the citizens of the United States of America and citizens of Germany.

The District Court, against the insistence of the petitioners that the rate of exchange to be adopted was the rate of exchange as of the date of the final decree, held that the rate of exchange to be used should be the rate at the date of the breach of contract to pay the indebtedness, namely, December 31, 1916. The District Court sustained the contention of the petitioners that no interest should be allowed upon the indebtedness between the dates mentioned. A decree was entered pursuant to the decision of the Court and upon appeal to the Circuit Court of Appeals for the Second Circuit, the decree of the District Court was affirmed in both particulars.

**STATUTE INVOLVED**

Section 9 of the Trading with the Enemy Act, 41 Stat. at L. 911, pursuant to which the suit was instituted by the respondents in the District Court, in so far as relevant here, is as follows:

That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States \* \* \* may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides \* \* \* (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant) to establish the interest, right, title, or debt so claimed, and if so established the Court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or the interest therein to which the Court shall determine said claimant is entitled.

**REASONS FOR GRANTING THE PETITION**

(1) There are now pending in the various courts numerous suits against these petitioners in which the same question of law is involved as is involved in this case.

(2) The decisions upon the question involved are not in accord, and it is desirable that this Court decide the question, in order that the numerous other suits may be expeditiously disposed of.

(3) There are now pending before the President and before the Alien Property Custodian and the Attorney General of the United States, to whom has been delegated certain powers of the President under the Trading with the Enemy Act, applications for the allowance of numerous claims filed by American citizens, pursuant to the provisions of Section 9 of the Trading with the Enemy Act, in which the applicants seek to have indebtednesses owing them in foreign currency paid out of funds in the possession of the petitioners, and the petitioners in passing upon such claims are hampered by the conflict in the decisions upon the question involved here.

JAMES M. BECK,  
*Solicitor General.*

## BRIEF IN SUPPORT OF THE PETITION

The district court, in calculating the amount of the enemy's indebtedness in United States money, should have adopted the rate of exchange existing at the date of the entry of the final decree.

This question arises principally because a court in the United States can not enter a decree or judgment in foreign money. This principle has long been established. *The Edith* (1871), Fed. Cas. No. 4281; *Erlanger v. Avengno*, 24 La. Ann. 77; *Bronson v. Rodes* (1868), 7 Wall. 229; *Butler v. Horwitz*, 7 Wall. 258.

The fact that the amount of the decree here must be stated in dollars is a mere incident to the rights and liabilities of the parties. The real question is what the parties agreed to do. It is quite clear that the enemy defendants agreed only to pay a specific number of German marks. Had the Germans tendered the plaintiffs prior to suit the number of marks called for by their obligation, plaintiffs would have been obliged to receive these marks in discharge of the obligation of the enemies. The enemies could not have been penalized, practically speaking, for failure to pay the debt on the day it was due. It is quite true that where a debt is due on a particular date and is not paid at that time, any subsequent payment is in the nature of damages, but in the case of debts for specific sums of money these damages are merely nominal. Chitty in his *Treatise on Pleading*, 16th edition, vol. 1, p. 121, says, with respect to actions of debt:

This action is so called because it is in legal consideration for the recovery of a *debt eo nomine* and *in numero*; and though *damages* are in general awarded for the detention of the debt, yet in most instances they are merely nominal, and are not, as in *assumpsit* and *covenant*, the principal object of the suit; and though this distinction may now be considered as merely technical, where the contract on which the action is founded is for the payment of money, yet in many instances we shall find it material to be attended to.

The only recompense which the law recognizes for the failure to pay the amount of this debt is the payment of interest.

The authorities upon this question can not be said to be uniform. There would seem to be four possible rates of exchange which could be adopted for transmuting the amount of a debt in foreign currency into currency of the United States: (1) the rate of exchange prevailing on the date the payment should have been made or the cause of action accrued, or (2) the rate of exchange prevailing on the date the suit for the recovery of the debt is commenced, (3) the rate of exchange prevailing on the date the verdict or judgment is entered, or (4) the rate of exchange prevailing on the date the judgment is paid or execution made thereon. See *Columbia Law Review*, vol. 22, p. 217. The second and fourth suggested rates of exchange can be eliminated at once, as most of the authorities do eliminate them. The second suggestion is hardly tenable, since the com-

mencement of suit means nothing more than the submission of the dispute for determination by a properly authorized tribunal and to have put upon the obligation the official stamp of the State. The fourth suggested rate of exchange can hardly be adopted, since prior to the date of the payment of the judgment or the execution thereon the old obligation has already been translated at the date of the entry of the judgment into an obligation payable in money of the United States, and the judgment could not have been entered in any other money. Hence, prior to the date of execution the old obligation had been merged in an obligation payable in currency of the United States.

The question then reduces itself to one as to whether the rate of exchange prevailing at the date of the failure to pay, or breach of contract, should be used, or the rate at the date when the judgment is entered. Prior to the Great War the authorities were few and were far from satisfactory. However, the question had protruded itself enough to cause comment by one of the great text writers of the nineteenth century. Justice Story, in his *Conflict of Laws*, 7th edition, Section 308, in commenting upon the principle laid down in the case of *Lee v. Wilcocks*, 5 Sergeant & Rawle (Pa.), 48, says:

In a late American case, where the payment was to be in Turkish piasters, but it does not appear from the report where the contract was made or may be payable, it was held to be the settled rule "where money is the object of the suit to fix the value according



to the rate of exchange at the time of the trial." It is impossible to say that the rule laid down in such general terms ought to be deemed of universal application, and cases may be easily imagined which may justly form exceptions.

In the case of *Grant et al. v. Healey* (1839), Fed. Cas. No. 5696, which was decided by Mr. Justice Story, the learned text writer apparently adopted the rate of exchange prevailing at the date of judgment.

Justice Story goes on the assumption in this case that the creditor of a foreign debtor is to be compensated for the delay in the payment of the obligation not by having imposed upon the debtor a new obligation to pay something he did not agree to pay but by having awarded to him interest for the period of the delay. See also *Cropper v. Nelson*, Fed. Cas. 3417; *Smith v. Shaw*, Fed. Cas. 13107.

Perhaps the leading case upon the subject prior to the time when the questions as to rate of exchange became acute was a case decided by the Supreme Court of Wis. *Hawes v. Woolcock*, 26 Wis. 629.

See also *Lee v. Wilcocks*, 5 Sergeant & Rawle; *Robinson v. Hall*, 28 How. Prac. 342. In *Scott v. Hornsby*, 1 Call. (Va.) 35, the Court said:

As to the other point (i. e., the rate of exchange) the sterling money was properly settled at the time of the judgment, because the rate of exchange was liable to fluctuation and therefore should be ascertained at the time when the plaintiff is to get his money.

See also *Comstock v. Smith*, 20 Mich. 338; *Murphy v. Camac*, Fed. Cas. 9948; *The Blohm*, Fed. Cas. 1556; *Marbury v. Marbury* (1866), 26 Md. 17.

It would seem, therefore, that prior to the Great War the weight of authority in the United States was that the rate of exchange prevailing at the time of judgment was the proper one to be adopted in calculating the amount of a judgment in United States money where the obligation sued upon was payable in foreign money.

The earlier English decisions seem to be as much confused as the American. The earliest case which has been found which could possibly have any bearing upon the subject is that of *Elkins v. East India Company* (1717) 1 P. Williams, 395.

The entire judgment reads as follows:

Let the master see what was the interest on money during these years in the Indies and what is the charge of returning money from the Indies to England, and he is to allow Indian interest, deducting out of it the charge of returning.

The use of the present tense by the court when it says that the master is to ascertain what is the charge of returning money from the Indies to England would seem to mean the charge at the time judgment was entered.

See *Scott v. Beavan*. 2 Barn. & Adolphus 78.

Coming down to more modern decisions, the last English case upon the subject prior to the very recent cases, which will be discussed presently, was

the case of *Manners v. Pearson* (1898), Ch. Div. 581. In view of the fact that the *Manners case*, in its proper interpretation, clearly lays down the rule that the rate of exchange prevalent at the date of judgment is to be adopted under circumstances such as the present, and in view of the still further fact that the English courts, including the House of Lords, have been at great pains in their endeavors to distinguish the *Manners case* from recent cases in which they have decided contrary to the *Manners case*, it will be interesting to examine that case somewhat carefully.

In the *Manners case* the decision was by a court divided two to one. The recent English cases have referred more to the opinion of the minority, Judge Vaughn Williams, than to the majority opinion. This is due to the fact that the English courts in the recent English cases have not desired to follow the majority opinion, but they hesitated flatly to overrule it. That case was an action for a breach of contract to pay for labor. The contract dated October 6, 1891, was entered into in Mexico between the plaintiff's deceased and the defendants. The plaintiff's deceased signed the contract in Mexico and the defendants in London. By it the defendants agreed to pay the deceased (1) the sum of £595 17s. 6d., in English money, on the execution of the agreement, and (2) one cent in Mexican currency for every cubic meter of certain excavation works mentioned in the agreement, which money was payable from time to time as and when the same should be received by the defendants from the Junta or Committee of Man-

agement of the drainage works of the city and valley of Mexico. The sum to be paid upon the execution of the contract was duly paid. The other sums, however, provided for under the second portion of the contract were not paid.

On June 11, 1896, the personal representative of the deceased brought an action for account. The action did not come on for trial until November 4, 1897. The defendants kept their accounts in Mexican dollars. On November 13, 1897, in order to avoid having the account taken in chambers, the defendants delivered an account showing that a balance of \$19,366 in Mexican currency was due to the estate represented by the plaintiff on August 31, 1896, which sum they offered to pay in dollars or in English currency equal to the value of the dollars on November 13, 1897. The plaintiff in the case contended that the balance due on the account ought to be turned into English money on August 31, 1896, when the account was completed. At that date the Mexican dollar was worth 2s. 6d. The defendants, on the other hand, contended that the balance ought to be turned into English money on November 13, 1897, when the actual amount was first ascertained and when the dollar was worth only 1s. 6½d. The court found in favor of the contention of the defendant, and this was affirmed on appeal.

The recent American decisions are not in accord upon this question. There are a number of decisions holding that the proper rate of exchange to adopt under circumstances such as the present is the rate

at the date of judgment or decree. There are others which hold that the rate as of the date of the breach of contract or the date the cause of action accrued is the proper rate. In the latter cases the decisions are for the most part a result of a blind following of the case of *Owners of S. S. Celia v. Owners of S. S. Volturno*, 1921, L. R. 2 App. Cas. 544, decided by the House of Lords, and which was a case sounding in tort. This case will be discussed later.

In *The Hurona*, 268 Fed. 910, decided in the District Court of the United States for the Southern District of New York by Judge Augustus N. Hand on April 3, 1920, where certain advances had been made to the master of a vessel amounting to 119,-007.65 francs between June 3 and July 12, 1919, the court held that in a proceeding instituted in rem to recover the amount of the advances the rate of exchange prevailing at the date of the entering of the decree should be adopted. The court in reaching its decision cited the case of *Grant v. Healey, supra*, and *Hawes v. Woolcock, supra*.

On the same day in the same court the same judge handed down a decision in the case of *The Verdi*, 268 Fed. 908, where the suit was to recover damages for a collision off quarantine anchorage, Staten Island, New York, on September 21, 1915. The vessels were each British owned. The temporary repairs and expenses in New York were \$1,509. The permanent repairs and expenses were incurred in England, and were paid for there on or about January 1,

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1915, in British currency, amounting to £1,791.2.6. The demurrage in New York and England occasioned by the collision amounted to £6,478.0.9. The Commissioner converted these sums into American dollars at \$4.74 per pound sterling, the rate of exchange on January 1, 1916, the date upon which it was apparently assumed by the parties that all the damages were ascertainable. Judge Hand in deciding the case had before him the correctness of the commissioner's ruling as to the rate of exchange. The question was whether the rate of exchange should be the rate determined by the commissioner or the rate at the time of the entry of the decree. Judge Hand confirmed the commissioner's report.

These two cases, being decided by the same court on the same date, are interesting in that the court reaches one conclusion in the case where damages in tort are sought to be recovered and another conclusion in a case in which it is sought to recover the amount of a debt. Judge Hand, with one exception, is the first judge to recognize the distinction in such cases as these between actions in tort and actions for the payment of debts, and it is because of the failure of the courts to recognize these distinctions and an apparent desire to prevent loss by persons who have dealt in foreign currency, which has depreciated, that has led the courts astray.

In the case of *Page v. Levenson et al.*, 281 Fed. 555, decided by Judge Rose in May, 1922, in the United States District Court for the District of Maryland,



it was held that the rate of exchange to be used in calculating an amount due in French currency is the rate prevailing at the time of breach of contract. Judge Rose based his decision largely upon the decision of the House of Lords in the case of *S. S. Celia v. S. S. Volturno*, *supra*. The Judge himself recognized the difficulties involved and that it was practically an impossibility to answer the contrary contentions.

The decision in the *Page case* is of little assistance in a discussion of the proposition involved. In *Liberty National Bank of New York v. Burr*, in the District Court of the United States for the Eastern District of Pennsylvania, 270 Fed., 251, an action was brought at law in assumpsit, and the question came up on a rule for want of a sufficient affidavit of defense. The suit was on a bill of exchange drawn and accepted in London, and made payable there in pounds sterling. It was held that leave to the plaintiff would be granted to move for judgment on a sum based on the rate of exchange prevailing at the time judgment was entered.

The history of the subject in the New York State courts is far from satisfactory. In the case of *Gross v. Mendel*, 171 App. Div. 237, decided by the appellate division of the Supreme Court in 1916, and affirmed in a memorandum opinion by the Court of Appeals, 225 N. Y. 633, the Court held that in an action brought to recover upon an acceptance of a bill of exchange drawn by and payable to the plain-

tiffs at Leipsig, Germany, for a certain number of marks, plaintiff was entitled to recover in United States money a sum sufficient to have purchased the marks at the time the defendant agreed to pay them.

It will be noted that this case was decided upon the so-called re-exchange theory. On the other hand, in the case of *Sirie v. Godfrey*, 196 App. Div. 529, decided by the Appellate Division of the Supreme Court in April, 1921, the court held that in a suit to recover for the amount of goods sold, the bill having been rendered in francs, the rate of exchange to be taken should be the rate prevailing at the time of the trial. It is interesting to note the following expression of the court:

The purchase price of the goods in question was not payable in American dollars nor was it payable in German marks. It was payable in French francs, and by merely bringing action in this jurisdiction the plaintiff, I apprehend, acquired no right to a more favorable judgment than she could have obtained had action been brought in France.

On page 537 of the opinion the court distinguishes the case of *Gross v. Mendel*, *supra*.

The most recent expression of the New York courts is found in the case of *Hoppe v. Russo-Asiatic Bank*, 200 App. Div. 460, decided by the appellate division of the Supreme Court in March, 1922, and affirmed in a memorandum opinion by the Court of Appeals in 235 N. Y. 37. This action was brought to recover a debt payable in pounds. The court relied

upon *Gross v. Mendel, supra*. The case went to the Court of Appeals on the question of the proper rate of exchange, and the court in a memorandum opinion simply held:

In an action properly brought in the courts of this state by a citizen or an alien to recover damages, liquidated or unliquidated, for the breach of contract or for a tort where primarily the plaintiff is entitled to recover a sum expressed in foreign money, in determining the amount of the judgment expressed in our currency, the rate of exchange prevailing at the date of the breach of contract, or at the date of the commitment of the tort is, under ordinary circumstances, to be applied.

The English case upon which all proponents of the proposition that the rate of exchange prevailing at the date of breach of contract or the accrual of the action should be adopted is *Owners of S. S. Celia v. Owners of S. S. Volturno* (1921), L. R. 2 App. Cas. 544. In that case the action arose out of a collision which occurred in the Mediterranean Sea between the English steamship *Celia* and the Italian steamship *Volturno*. The trial court held both ships equally to blame and referred the question of damages to the registrar. The cross-claims for damages were agreed subject to a question raised by the owners of the *Volturno* as to one item of their claim which was calculated in lire as to the rate of exchange. The question was whether in calculating the amount

which the respondents, the owners of the *Volturmo*, were entitled to recover from the appellants, the owners of the *Celia*, in respect to damages for the use of their vessel the rate of exchange to be taken should be taken at the time the loss was incurred or at the time of the assessment or payment. The trial court held that the rate of exchange in respect of the claims for detention should be fixed as at the periods of detention. This was affirmed by the Court of Appeal and upon appeal to the House of Lords the appeal was dismissed, four of the justices holding in favor of the rule that the rate should be fixed as of the periods of detention and one justice dissenting.

It is to be noted that this was an action sounding in tort and may well be distinguishable from actions for the payment of simple debts.

In *Lebeaupin v. Crispin & Co.*, (1920) 2 K. B. D. 714, the court held that the damages assessed at \$12,500 were payable in London at the rate of exchange existing upon the date of the breach of contract. This was an action brought to recover damages for failure to deliver goods. To the same effect as to damages for breach of contract to deliver goods, see *Di Ferdinando v. Simon, Smits & Co.*, decided in 1920 by the Court of Appeal (1920), 3 K. B. D. 409. These are the leading cases for the facts which they cover.

The case of *Société des Hôtels du Touquet-Paris-Plaza v. Cummings* (1921), L. R. 3 K. B. D. 459,

seems to be *contra* to the decision of *S. S. Celia v. S. S. Volturmo*, *supra*.

The learned Judge of the District Court held that if a debt was not paid when due, payment thereafter was not a payment of the debt but a payment of damages for failure to pay the debt. This, of course, is resorting to very technical grounds. If, however, technical grounds are to be employed in reaching the results, the reasons should be technical throughout, and not technical as they seem to do moral justice. The difficulty with the learned judge's decision in the lower court upon this proposition is that he failed to take into consideration, as the judges in the *Société des Hôtels* case did, namely, that damages for failure to pay a debt are merely nominal and that the proposition that the suit to recover a debt is not a suit to recover the money owed, but to recover the damages incurred by reason of the failure of the debtor to pay, may not be used as a ground for permitting the plaintiff to recover more than the defendant agreed to pay.

In the present case the defendant agreed to pay 1,079 marks. Had the plaintiffs been in Germany at any time and had the defendants tendered them 1,079 German marks they could not have refused to accept them. Merely because the suit is brought in a court of the United States where the court is compelled by reasons based fundamentally on policy to give judgment in money other than the money in which the debt was incurred should not operate to

compel the debtor to do something he did not agree to do.

For the foregoing reasons it is respectfully submitted that the petition shall be granted.

JAMES M. BECK,

*Solicitor General.*

DEAN HILL STANLEY,

*Special Assistant to the Attorney General.*

MAY, 1924.

○

FILED

MAY 31 1924

No. 10,481

STANBURY

CLERK

IN THE

## Supreme Court of the United States

OCTOBER TERM, 1925

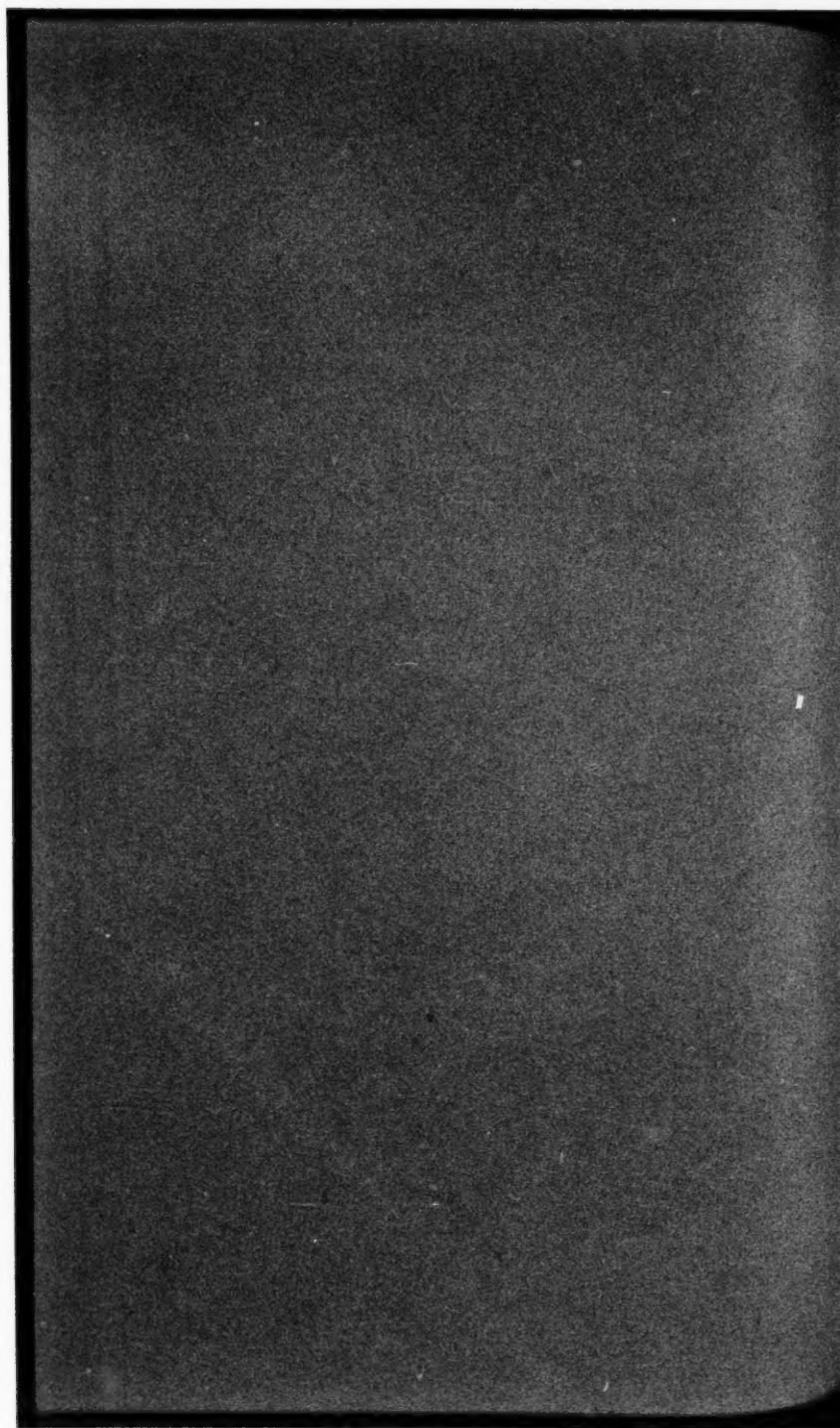
BENJAMIN GUINNESS, WALTER T. ROSEN, MORITZ ROSENTHAL, SIDNEY H. MARCH, RUDOLF METZ AND HARRY B. LAKE, AND ANNA THALMANN AND MORITZ ROSENTHAL, AS TRUSTEES OF THE ESTATE OF ERNST THALMANN, DECEASED, COPARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF LADENBURG, THALMANN & CO.,

*Petitioners,**against*

THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN, FRANK WHITE, AS TREASURER OF THE UNITED STATES AND CARL JORDGER, GUSTAF RATJEN, LUDWIG KORTE, ARTHUR FREIHERR VON SCHICKLER, MARGARETE GRAFIN VON POURTALES, ESTATE OF LUDWIG DELBRUCK, DECEASED, COPARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF DELBRUCK, SCHICKLER & COMPANY,

*Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.





IN THE

# Supreme Court of the United States

OCTOBER TERM 1923

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BENJAMIN GUINNESS, WALTER T. ROSEN, MORITZ ROSENTHAL, SIDNEY H. MARCH, RUDOLF METZ and HARRY B. LAKE, and ANNA THALMANN and MORITZ ROSENTHAL, as Trustees of the Estate of Ernst Thalmann, deceased, copartners doing business under the firm name and style of LADENBURG, THALMANN & Co.,  
Petitioners,

AGAINST

THOMAS W. MILLER, as Alien Property Custodian, FRANK WHITE, as Treasurer of the United States and Carl Joerger, Gustaf Ratjen, Ludwig Korte, Arthur Freiherr von Schickler, Margarete Graf von Pourtales, Estate of Ludwig Delbruck, deceased, copartners doing business under the firm name and style of Delbruck, Schickler & Company,  
Respondents.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners Benjamin Guinness, Walter T. Rosen, Moritz Rosenthal, Sidney H. March, Rudolf

Metz and Harry B. Lake, and Anna Thalmann and Moritz Rosenthal, as Trustees of the Estate of Ernst Thalmann, Deceased, copartners doing business under the firm name and style of Ladenburg, Thalmann & Company, respectfully represent:

**Writ of Certiorari Applied for by  
Respondents.**

FIRST: The respondents, Thomas W. Miller as Alien Property Custodian, and Frank White as Treasurer of the United States are likewise making application for a writ of certiorari in this cause. The petitioners herein concede that this cause is one of far reaching public importance in respect of the matters concerning which the said Alien Property Custodian and Treasurer of the United States seek a review; but they represent to the Court that there is another matter of equally wide reaching importance involved in this cause, concerning which the said Alien Property Custodian and Treasurer of the United States do not seek a review, because it was decided in their favor by the courts below, but which it is respectfully submitted ought to be reviewed together with the matters proposed for review by those respondents.

**Matters Involved in This Cause.**

SECOND: The defendants constituting the firm of Delbruck, Schickler & Company (who did not appear or answer in this suit) owed to plaintiffs on December 31st, 1916 the sum of 1,079.35 German reichsmarks. This amount was not paid prior to the commencement of the war with Germany on April 6th, 1917. Pursuant to the provisions of

Section 9 of the Trading with the Enemy Act a notice of claim was filed against property of the defendants Delbruck, Schickler & Company seized by the Alien Property Custodian, and thereafter this suit was commenced under the provisions of Section 9 of the Trading with the Enemy Act to recover the amount of the debt with interest. It was conceded by the defendants, the Alien Property Custodian and the Treasurer of the United States, that they had funds of the alien enemy in their hands sufficient to pay the debt.

As the amount of the debt was admitted, and represented by a stated account, only two questions, and those of the most far reaching importance, were involved in this suit:

1. At what rate of exchange were the complainants entitled to recover from the Alien Property Custodian the debt originally expressed in German reichsmarks?

The Alien Property Custodian and the Treasurer of the United States contended that the correct rate of exchange was that existing on the date when judgment was entered, which was 1/25,000 of one cent for each reichsmark.

Both Courts below decided that the correct rate of exchange was the one existing at the time when the debt was created which was 18¼ cents for each reichsmark.

The judgment actually entered was at the rate of 17½ cents for each German reichsmark, because the complaint asked for judgment only in that amount—which is also the rate fixed by the Treaty of Versailles.

2. The second question involved is, shall interest be allowed on whatever amount may be recovered

between April 6, 1917 and July 14, 1919, the first date being that of the commencement of the war, and the second date being that when through proclamation of the President, trading with Germany again became lawful?

The Courts below have both held that interest for such period may not be recovered.

We deem this result to be erroneous, as being in conflict with the Treaty of Peace between Germany and the United States.

### **The Importance of the Question Presented.**

THIRD: It has been officially stated that the Alien Property Custodian has seized German property to the value of many hundred millions of dollars, and that claims for a large proportion of that amount have been made by American citizens in respect of prewar debts owing to them by the Germans whose property was seized.

The question presented in this case, of whether interest should be allowed on the debt owing by the German citizen from April 6th, 1917 to July 14th, 1919 is one which will arise necessarily, and is necessarily involved, in the case of every claim made against the Alien Property Custodian for the payment of a prewar debt owing by a German whose property has been seized by the Alien Property Custodian.

The case is not only of intrinsic importance as involving a large sum of money, in the aggregate, and as involving the decision and proper disposition of tens of thousands of similar claims, but it is important also because it involves the application of the provisions of the Treaty of Peace between the United States and Germany; because it is chiefly

in reliance upon the provisions of that Treaty that your petitioners claim that interest should be allowed.

### **Grounds of Decision by Courts Below.**

FOURTH: The Courts below both held that at common law interest was not payable on a debt owing by an alien enemy during the period when he was not allowed to communicate with his creditor to pay the debt; and they further held that the terms of the Treaty of Peace did not alter this rule as applied to suits instituted under Section 9 of the Trading with the Enemy Act.

**Under the provisions of the Treaty of Peace between the United States and Germany interest must be allowed for the period of the war in suits brought under Section 9 of the Trading with the Enemy Act to recover pre-war debts.**

FIFTH: We believe that we have conclusively demonstrated the correctness of our contention in the brief annexed to our petition.

WHEREFORE your petitioners, who have no right to appeal to this Court, pray that this Court will be pleased to grant a writ of certiorari directed to the United States Circuit Court of Appeals for the Second Circuit requiring that Court to send a full and complete transcript of the record in the above entitled cause to this Court for its review and determination.

ALEXANDER B. SIEGEL,  
Counsel for Petitioners.

STATE OF NEW YORK, }  
 County of New York, } ss.:

ALEXANDER B. SIEGEL being duly sworn deposes and says: That he is counsel for the petitioners herein Benjamin Guinness, Walter T. Rosen, Moritz Rosenthal, Sidney H. March, Rudolf Metz and Harry B. Lake, and Anna Thalmann and Moritz Rosenthal, as Trustees of the Estate of Ernst Thalmann, deceased, copartners doing business under the firm name and style of Ladenburg, Thalmann & Co.; that he prepared the foregoing petition for a writ of certiorari; that the allegations of fact in said petition are true, as he is informed and verily believes, and that said petition, in his opinion, is well founded in law as well as in fact.

ALEXANDER B. SIEGEL,  
 Counsel for Petitioners.

Sworn to before me this 28th }  
 day of May, 1924. }

JOHN HOWARD KEIM,  
 Notary Public,

New York County,  
 County Clerk's No. 71.

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1923

BENJAMIN GUINNESS, *et al*, copartners  
doing business under the firm name  
and style of LADENBURG, THALMANN  
& Co.,

Petitioners

AGAINST

THOMAS W. MILLER, as Alien Property  
Custodian, FRANK WHITE, as Treas-  
urer of the United States and Carl  
Joerger *et al*, copartners doing busi-  
ness under the firm name and style  
of Delbruck, Schickler & Company,  
Respondents.

**INDEX OF ARGUMENT.**

	PAGE
Introduction .....	1
Statement of question argued in brief.....	1
Provisions of the Treaty of Peace.....	2
Section 2 of Act of July 2, 1921 declaring peace between the United States and Germany .....	2
Quotations from Treaty of Peace with Germany .....	2
Quotation from Resolution of ratification...	3
The effect of the Treaty.....	4
Incorporates certain provisions of the Treaty of Versailles.....	4

## II

	PAGE
The specific legal question in this case.....	4
Whether Part X of Versailles Treaty provides that on prewar debts recovered out of prop- erty in hands of Alien Property Custodian interest should be allowed for the period of the War.....	4
The Provisions of Part X of the Versailles Treaty.	4
Provisions of Section III of Part X.....	4
Provisions of Section IV of Part X.....	5
Quotation from Subdivision 2 of Paragraph <i>h</i> of Arti- cle 297.....	5
Quotation from paragraph 4 of the Annex to Article 297 .....	5
These Quotations establish that Part X of Versailles Treaty states rules with respect to property rights in German property seized by the Alien Property Custodian .....	6
Quotation from Paragraph 14 of the Annex to Section IV .....	7
Action of United States thereunder has result of adopt- ing Treaty Rule with respect to allowance of interest .....	8
Quotation from Subdivision 22 of the Annex to Sec- tion III with respect to all <del>ance</del> <sup>ance</sup> of interest....	9
This establishes Treaty Rule that interest is to be al- lowed on German debts recovered out of German property in hands of Alien Property Custodian for period of war.....	9



IN THE  
SUPREME COURT OF THE UNITED STATES,  
OCTOBER TERM 1923.

BENJAMIN GUINNESS, WALTER T.  
ROSEN, MORITZ ROSENTHAL, SIDNEY H.  
MARCH, RUDOLPH METZ and HARRY  
B. LAKE, and ANNA THALMANN and  
MORITZ ROSENTHAL, as Trustees of  
the Estate of Ernst Thalmann, De-  
ceased, Copartners, doing business  
under the firm name and style of  
LADENBURG, THALMANN & COMPANY,  
Petitioners,

AGAINST

THOMAS W. MILLER, as Alien Property  
Custodian, FRANK WHITE, as Treas-  
urer of the United States, and CARL  
JOERGER, GUSTAF RATJEN, LUDWIG  
KORTE, ARTHUR FREIHERR VON  
SCHICKLER, MARGARETE GRAFIN VON  
POURTALES, ESTATE OF LUDWIG DEL-  
BRUCK, Deceased, Copartners, doing  
business under the firm name and  
style of DELBRUCK, SCHICKLER &  
COMPANY,

Respondents.

**BRIEF IN SUPPORT OF PETITION  
FOR WRIT OF CERTIORARI.**

**Introduction.**

This brief deals only with one question:

In a suit brought under the Trading with the  
Enemy Act, against the Alien Property Custodian

to recover a pre-war debt owing by a German National, whose property has been seized by the Alien Property Custodian, shall interest be allowed for the period between April 6, 1917 and July 14, 1919?

And, we limit the question still further by confining our brief to a discussion of whether such interest must be allowed pursuant to the terms of the Treaty of Peace between the United States and Germany.

### **Provisions of the Treaty of Peace.**

The Treaty of Peace with Germany was made pursuant to the Act of July 2, 1921, terminating the state of war between the United States and Germany. Section 2 of that Act provides as follows:

"That in making this declaration, and as a part of it, there are expressly reserved to United States of America and its nationals, any and all rights, privileges, indemnities, reparations or advantages together with the right to enforce the same \* \* \* which, under the Treaty of Versailles have been stipulated for its or their benefit."

The Treaty of Peace with Germany, of which ratifications were exchanged on November 11th, 1921, and which was proclaimed on November 14th, 1921, after reciting the above quoted provision of the Act of Congress, contains the following:

#### **"ARTICLE I.**

Germany undertakes to accord to the United States, and the United States shall have and enjoy, all the rights, privileges, indemnities, reparations or advantages specified in the aforesaid Joint Resolution of the Congress of the United States of July 2, 1921, including all

the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles which the United States shall fully enjoy notwithstanding the fact that such Treaty has not been ratified by the United States."

#### "ARTICLE II.

With a view to defining more particularly the obligations of Germany under the foregoing Article with respect to certain provisions in the Treaty of Versailles, it is understood and agreed between the High Contracting Parties:

(1) That the rights and advantages stipulated in that Treaty for the benefit of the United States, which it is intended the United States shall have and enjoy, are those defined in Section 1 of Part IV, and Parts V, VI, VIII, IX, X, XI, XII, XIV and XV.

The United States in availing itself of the rights and advantages stipulated in the provisions of that treaty mentioned in this paragraph will do so in a manner consistent with the rights accorded to Germany under such provisions."

The attention of the Court is respectfully invited also to the Resolution of the Senate of the United States of October 18, 1921—two-thirds of the senators present concurring therein—by which the Senate gave its advice and consent to the ratification of this treaty, subject to the understanding, made a part of the Resolution of Ratification:

"That the rights and advantages which the United States is entitled to have and enjoy under this Treaty embrace the rights and advantages of nationals of the United States specified in the Joint Resolution or in the provisions of the Treaty of Versailles, to which this Treaty refers."

### **The Effect of the Treaty.**

From these quotations it is clear, we submit, that it was the intention of Congress and of the Treaty Making Power to establish as law certain provisions of the Treaty of Versailles conferring benefits upon citizens of the United States with the same effect as if the Treaty of Versailles had been ratified by the United States Senate. The portions of the Treaty of Versailles thus incorporated as the law of the land by the Treaty of Peace with Germany are defined, as shown by the quotation above from Article II of the Treaty of Peace, and included within such definition is Part X of the Treaty of Versailles.

### **The Specific Legal Question in this Case.**

Neither the Alien Property Custodian nor the Circuit Court of Appeals have differed with us in our contention that Part X of the Treaty of Versailles is, by virtue of the Provisions of the Treaty of Peace between the United States and Germany, a part of the law of the land. It is our contention, not sustained by the Circuit Court of Appeals, that pursuant to the provisions of Part X of the Versailles Treaty, as incorporated in the Treaty of Peace, interest must be allowed on debts recovered pursuant to the provisions of Section 9 of the Trading with the Enemy Act.

### **The Provisions of Part X of the Versailles Treaty.**

Part X of the Versailles Treaty consists of a number of sections, of which only Sections III and IV have any applicability.

Section III refers to the collection of pre-war debts through an International Clearing Office to which any country may adhere or not at its election. The United States has not adhered to the International Clearing Office.

Section IV contains the provisions relating to "Property Rights and Interests". Among the matters covered by Section IV with clearness and directness, as it seems to us, are the property rights in connection with German property seized by an allied or associated power which has not adopted Section III relating to the International Clearing Office.

Section IV consists of two Articles, 297 and 298, and an Annex.

Sub-division 2 of paragraph (h) of Article 297 provides as follows (the portion omitted from the quotation being irrelevant, dealing with the obligation of Germany to restore allied property to the owners thereof) :

"(2) As regards Powers not adopting Section III and the Annex thereto, \* \* \* *the proceeds of the property, rights and interests, and the cash assets, of German nationals received by an Allied or Associated Power shall be subject to disposal by such Power in accordance with its laws and regulations and may be applied in payment of the claims and debts defined by this Article or paragraph 4 of the Annex hereto.*"

Paragraph 4 of the Annex to Section IV is as follows :

"All property, rights and interests of German nationals within the territory of any Allied or Associated Power and the net proceeds of their sale, liquidation or other dealing therewith may be charged by that Allied or Associated Power in the first place *with pay-*

*ment of amounts due in respect of claims by the nationals of that Allied or Associated Power with regard to their property, rights and interests, including companies and associations in which they are interested, in German territory, or debts owing to them by German nationals, and with payment of claims growing out of acts committed by the German Government or by any German authorities since July 31, 1914, and before that Allied or Associated Power entered into the war. The amount of such claims" (and this obviously refers to the "claims" for damages last above referred to) "may be assessed by an arbitrator appointed by Mr. Gustave Ador, if he is willing, or if no such appointment is made by him, by an arbitrator appointed by the Mixed Arbitral Tribunal provided for in Section VI."*

These quotations establish beyond contradiction, it seems to us, that Part X of the Treaty of Versailles, which is concededly a part of the law of the land by incorporation into the Treaty between the United States and Germany, specifically refers to and establishes rules with respect to property rights in German property seized by the Alien Property Custodian.

What does it say about such property? It says:

(1) That such property shall be subject to disposition by the United States in accordance with its laws and regulations; and

(2) That it may be applied in payment of the claims and debts defined by paragraph 4 of the Annex to Section IV.

Among these claims and debts to which such property may be applied, there are listed in said paragraph 4 of the Annex to Section IV, debts owing to American nationals by German na-

tionals,—that is, debts recoverable pursuant to Section 9 of the Trading with the Enemy Act.

Do we find anything further in Part X in any manner defining such debts? We do; *and what we find is directly relevant to the question of whether interest should be allowed on such debts during the period of the war.*

Paragraph 14 of the Annex to Section IV provides as follows:

“The provisions of Article 297 and this Annex, relating to property, rights and interests in an enemy country, and the proceeds of the liquidation thereof, apply to debts, credits and accounts. Section III regulating only the method of payment.

*In the settlement of matters provided for in Article 297 between Germany and the Allied or Associated States, their colonies or protectorates, or any one of the British Dominions or India, in respect of any of which a declaration shall not have been made that they adopt Section III, and between their respective nationals, the provisions of Section III respecting the currency in which payment is to be made and the rate of exchange and of interest shall apply unless the Government of the Allied or Associated Power concerned shall within six months of the coming into force of the present Treaty notify Germany that the said provisions are not to be applied.”*

Section IV, therefore, provides that in the settlement of matters provided for in Article 297 between Germany and the Allied or Associated States, *and between their respective nationals*, the provisions of Section III with respect to the rate of interest shall apply unless the Government of the Allied or Associated State concerned shall notify Germany to the contrary.

It is conceded, and it was shown in the Court below by an official letter from the Secretary of State, that no such notice has been given by the United States.

The property rights and interests referred to in Article 297 include claims against seized German property; any country which did not adhere to the provisions for the International Clearing Office had the option, nevertheless, of obtaining for its citizens the benefit of the specifications in Section III with respect to the currency in which payment of prewar debts should be made, the rate of exchange and the rate of interest. If it did not want *those* benefits, and wished to rely on other provisions, it must notify Germany; and the United States did not so notify Germany.

What does this mean? Clearly that to determine the rate of exchange and the rate of interest payable in respect of debts which are to be recovered under the regulations of the United States out of funds seized by the Allied Property Custodian we must look to the provisions of Section III, which, it is true, deals primarily with the recovery through the International Clearing Office, *but by reference is also made applicable to the settlement of pre-war debts in a country which chose to settle those debts itself*, if it did not give notice that it rejected those provisions; the intent of the United States, as evidenced by its failure to give the notice which it might have given, obviously being that so far as concerns the amount of the debt which may be recovered, this should be the same as if the United States had adhered to the International Clearing Office, *although it retained in its own hands the settlement of the debt and the property out of which it was payable.*



The provision for the rate of interest is found in sub-division 22 of the Annex to Section III, as follows:

"The rate of interest shall be 5 per cent. per annum except in cases where, by contract, law or custom, the creditor is entitled to payment of interest at a different rate. In such cases the rate to which he is entitled shall prevail.

*Interest shall run from the date of commencement of hostilities (or, if the sum of money to be recovered fell due during the war, from the date at which it fell due) until the sum is credited to the Clearing Office of the creditor."*

*It is, therefore, specifically provided that so far as concerns the payment of debts out of property seized by the United States Government, interest shall run during the period of the war.*

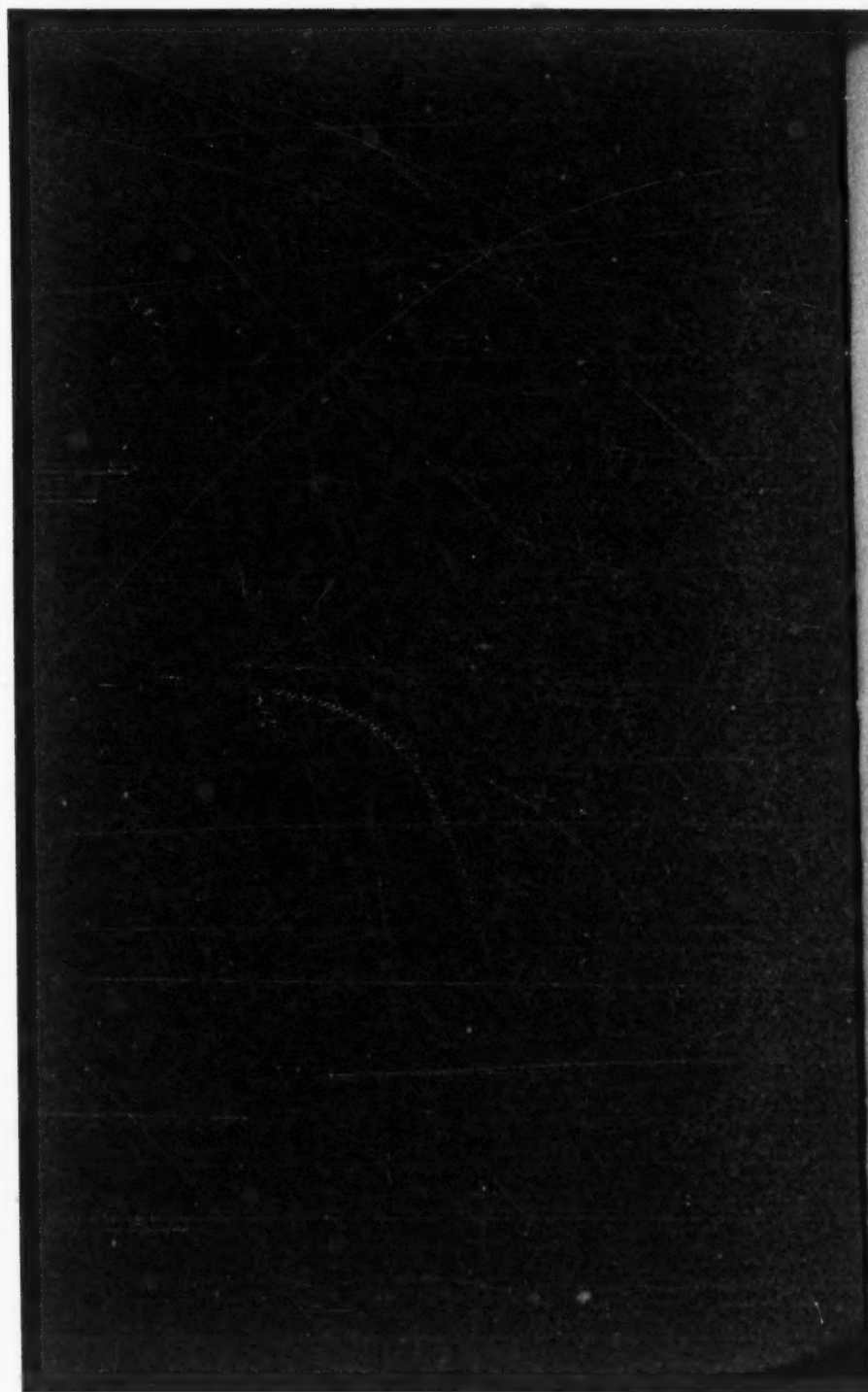
The provisions of the Treaty of Versailles were designed so that each country could at its election adhere to the International Clearing Office, but whether it did so or not, the amount payable in respect of debts owing by and to private persons out of property seized by the Government should not vary (unless the government concerned specifically so notified Germany) by reason of its adherence or non-adherence to the International Clearing Office. This gives the Treaty of Peace a construction which, we submit, is the only construction admitted by its terms; and which, moreover, accords with reason and logic.

**Conclusion.**

The decision of the Circuit Court of Appeals for the Second Circuit on the question of interest was erroneous; and since this decision involves a matter of widespread importance affecting not only the parties hereto, but tens of thousands of persons who have filed claims with the Alien Property Custodian, pursuant to the provisions of the Trading with the Enemy Act, and involves also the correct construction of the Treaty between the United States and Germany, it is respectfully submitted that the Writ of Certiorari should issue as prayed.

ALEXANDER B. SIEGEL,  
Of Counsel.





## TABLE OF CONTENTS

	Page
Previous decisions in these cases.....	1
Grounds of the jurisdiction of this court.....	2
Statement of the case.....	3
Questions presented.....	6
Argument:	
I. The District Court in calculating the amount of the German firm's indebtedness in United States money should have adopted the rate of exchange existing at the date of the entry of the final decree.....	6
II. The plaintiffs are not entitled to recover interest upon their debt for the period between April 6, 1917, and July 14, 1919.....	37
III. The treaty of peace between the United States and Germany, signed on August 25, 1921, has no application to the questions involved in this case.....	41
Conclusion.....	53
Appendix.....	56

### TABLE OF CASES

<i>Berry et al. v. Van den Hurk</i> , 36 T. L. R. 603.....	30
<i>Benners v. Clemens</i> , 58 Pa. 24.....	13
<i>Biglar v. Waller</i> , Chase, 316.....	38
<i>Birge-Forbes Co. v. Heye</i> , 251 U. S. 317.....	31
<i>Blohm, The</i> , Fed. Cas. No. 1556.....	13
<i>Bronson v. Rodes</i> , 7 Wall. 229.....	7
<i>Brown v. Hiatts</i> , 82 U. S. 177.....	37
<i>British American Continental Bank, in re</i> (1922), 2 Ch. 575.....	30
<i>Butler v. Horwitz</i> , 7 Wall. 258.....	7
<i>Butler v. Merchant</i> , 27 S. W. (Texas), 193.....	8
<i>Capron v. Adams</i> , 28 Md. 529.....	13
<i>Cash v. Kennion</i> , 11 Vesey, 314.....	17
<i>Celia, S. S. v. Volturmo, S. S.</i> (1921), L. R. 2 App. Cas. 544.....	20,
	22, 27, 36
<i>Comstock v. Smith</i> , 20 Mich. 338.....	13
<i>Cropper v. Nelson</i> , Fed. Cas. 3417.....	11
<i>Dante v. Miniggio</i> , 298 Fed. 845.....	30
<i>Delegal v. Naylor</i> , 7 Bing. 409.....	17
<i>Di Ferdinando v. Simon, Smits &amp; Co.</i> (1920), 3 K. B. D. 409.....	30
<i>Edith, The</i> , Fed. Cas. No. 4281.....	7
<i>Elkins v. East India Company</i> , 1 P. Williams, 395.....	16
<i>Erlanger v. Avengno</i> , 24 La. Ann. 77.....	7
<i>Forbes v. Murray</i> , 3 Ben. 497 (Fed. Cas. No. 4928).....	14
<i>Grant v. Healey</i> , Fed. Cas. No. 56306.....	10, 20, 36

## II

	Page
<i>Gross v. Mendel</i> , 171 App. Div. 237.....	27
<i>Grunwald v. Freese</i> , 34 Pac. (Calif.), 73.....	14
<i>Hargrave v. Creighton</i> , 1 Woods. 489 (Fed. Cas. No. 0064)....	13
<i>Hauca v. Woolcock</i> , 266 Wis. 629.....	11, 20, 36
<i>Hoare v. Allen</i> , 2 Dallas, 102.....	38
<i>Hoppe v. Russo-Asiatic Bank</i> , 200 App. Div. 400, aff. 235 N. Y. 37.....	26
<i>Hurona, The</i> , 268 Fed. 910.....	20
<i>Hussey v. Farlow</i> , 91 Mass. 263.....	14
<i>Jackson Insurance Co. v. Steicart</i> , 1 Hughes 310.....	38
<i>Jelison v. Lee</i> , 3 Woodb. & M. 368.....	14
<i>Katcher v. American Express Co.</i> , 94 N. J. L. 165.....	30
<i>Kirsch &amp; Co. v. Allen</i> , 36 T. L. R. 59.....	27
<i>Lebeaupin v. Crispin &amp; Co.</i> (1920), 2 K. B. D. 714.....	30
<i>Lee v. Wilcocks</i> , 5 Sergeant & Rawle (Pa.) 48.....	10, 13
<i>Liberty National Bank of New York v. Burr</i> , 270 Fed. 251.....	24
<i>Marbury v. Marbury</i> , 26 Md. 8.....	13, 15
<i>Manners v. Pearson</i> (1808), 1 Ch. 581.....	17
<i>Mayer v. Reed</i> , 37 Ga. 482.....	38
<i>McKiel v. Porter</i> , 4 Ark. 534.....	14
<i>Müller v. Robertson</i> , 266 U. S. 243.....	40
<i>Murphy v. Cumac</i> , Fed. Cas. No. 9048.....	13
<i>New York Life Insurance Co. v. Davis</i> , 95 U. S. 425.....	40
<i>Page v. Levenson</i> , 281 Fed. 555.....	23
<i>Rasat v. Morris</i> , 135 Md. 243.....	30
<i>Revillon v. Demme</i> , 114 Misc. 1.....	27
<i>Roberts, Adm., v. Cocke</i> , 28 Gratt. 207.....	38
<i>Robinson v. Hall</i> , 28 How. Pr. 342.....	13
<i>Saigon Maru</i> , 267 Fed. 881.....	26
<i>Scott v. Bevan</i> , 2 B. & Ad. 78.....	17
<i>Scott v. Hornsby</i> , 1 Call (Va.) 35.....	13
<i>Simonoff v. Bank</i> , 279 Ill. 248.....	30
<i>Sirie v. Godfrey</i> , 196 App. Div. 529.....	27
<i>Smith v. Shaw</i> , 2 Wash. C. C. 167 (Fed. Cas. No. 13,170).....	9, 11
<i>Société des Hôtels du Touquet-Paris-Plage v. Cumming</i> (1921), L. R. 3 K. B. D. 459.....	30
<i>Spreckles v. The Weatherly</i> , 48 Fed. 734.....	14
<i>Stringer v. Coombs</i> , 62 Me. 160.....	14
<i>Taan v. LeGaus</i> , 1 Yeates (Pa.) 204.....	9
<i>Ullendahl v. Pankhurst, Wright &amp; Co.</i> , 39 T. L. R. 628.....	9
<i>Verdi, The</i> , 268 Fed. 908.....	21
<i>Wichita Mill &amp; Elevator Co. v. Naamloose, etc.</i> , 3 Fed. (2d) 931.....	30
<i>Wormser v. Marroquin</i> , 249 Fed. 428.....	30

### TABLE OF STATUTES

#### Trading with the enemy act:

Sec. 9, as amended June 5, 1920. 41 Stat. L. 977.....	2
Sec. 17. 40 Stat. L. 425.....	3

### III

Sec. 240, Judicial Code, 36 Stat. L. 1157-----	Page 2
Treaty of peace between the United States and Germany, 42 Stat. L. 1939-----	41
Treaty of Versailles, Senate Document No. 85, 66th Cong., 1st session-----	41, 55

#### TEXTBOOKS AND REVIEWS CITED

Chitty on Pleading, 16th Ed., Vol. I, p. 121-----	34
Columbia Law Review, vol. 22, p. 217-----	7, 32
Columbia Law Review, vol. 20, pp. 914 and 922-----	36
Harvard Law Review, vol. 20, p. 873-----	36
Harvard Law Review, vol. 34, pp. 422 and 435-----	36
Law Quarterly Review, vol. 37, p. 38-----	36
Michigan Law Review, vol. 19, p. 652-----	36
Pennsylvania Law Review, vol. 68 (59 American Law Regis- ter), p. 395-----	36
Yale Law Journal, vol. 31, p. 198-----	36
Sedgwick on Damages, 9th ed. sec. 274-----	15
Story, Conflict of Laws, 7th ed. sec. 308-----	10
Sutherland on Damages, 4th ed. sec. 213-----	15





# In the Supreme Court of the United States

OCTOBER TERM, 1925

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No. 80

FREDERICK C. HICKS, AS ALIEN PROPERTY CUSTODIAN, and Frank White, as Treasurer of the United States, petitioners

v.

BENJAMIN GUINNESS, WALTER T. ROSEN, MORITZ Rosenthal, et al., etc.

---

No. 81

BENJAMIN GUINNESS, WALTER T. ROSEN, MORITZ Rosenthal, et al., etc., petitioners

v.

FREDERICK C. HICKS, AS ALIEN PROPERTY CUSTODIAN; Frank White, as Treasurer of the United States; and Carl Joerger et al., etc.

---

*ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

**BRIEF ON BEHALF OF FREDERICK C. HICKS, AS ALIEN PROPERTY CUSTODIAN, AND FRANK WHITE, AS TREASURER OF THE UNITED STATES**

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**PREVIOUS DECISIONS IN THESE CASES**

The opinion of the Circuit Court of Appeals in this case is reported in 299 Fed. 538. The opinions

(1)

of the District Court are reported in 291 Fed. 768 and 291 Fed. 769.

#### FOUNDATIONS OF THE JURISDICTION OF THIS COURT

These cases have been brought to this Court by writs of certiorari granted on June 9, 1924 (R. 32), to review a judgment of the United States Circuit Court of Appeals for the Second Circuit (R. 27) dated April 21, 1924 (299 Fed. 538), which affirmed a final decree of the District Court of the United States for the Southern District of New York (R. 13) dated July 17, 1923 (291 Fed. 768, 291 Fed. 769). The writ of certiorari in case No. 80 was issued upon the petition of Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States, defendants, in the District Court, and in case No. 81, upon the petition of Benjamin Guinness et al., plaintiffs, in the District Court. The writ of certiorari was issued pursuant to Section 240 of the Judicial Code (36 Stat. L. 1157).

The suit in the District Court was instituted by plaintiffs pursuant to the provisions of Section 9 of the Trading with the Enemy Act, as amended, June 5, 1920 (41 Stat. L. 977), to recover out of money and property held by the Alien Property Custodian and the Treasurer of the United States as the property of Delbruck Schickler & Company, enemies, the amount of an indebtedness owing to the plaintiffs by the said enemies. The provisions of the Judicial Code are extended to

the orders and decrees made under the Trading with the Enemy Act by Section 17 of that Act (40 Stat. 425).

#### STATEMENT OF THE CASE

For many years prior to April 6, 1917, the defendant, Delbruck, Schickler & Company, a German partnership (hereinafter referred to as the German firm) was engaged in transactions with the partnership of Ladenburg, Thalmann & Company, the plaintiffs (hereinafter referred to as the American firm).

On April 6, 1917, the date of the outbreak of war between the United States and Germany, the German firm was indebted to the American firm in the sum of M. 1079.35 as of January 1, 1916, as shown by an account stated, dated December 31, 1916, duly acknowledged by the German firm. There were no dealings between the two firms after December 31, 1916. Against the indebtedness owed by the German firm there was a set-off of \$35.35. (R. 9.)

After the approval of the Trading with the Enemy Act there was transferred and paid to the Alien Property Custodian certain money and other property belonging to the German firm and there is now held by the Custodian or the Treasurer of the United States an amount greater than the claim of the American firm.

The American firm instituted a suit under Section 9 of the Trading with the Enemy Act as

amended June 5, 1920 (41 Stat. L. 977), to recover the amount of its indebtedness, with interest from December 31, 1916, out of the money and other property held by the Custodian and the Treasurer of the United States. (R. 9.)

The evidence in the case has been stipulated (R. 8 to 10), and the facts are undisputed. The only questions which the lower Courts were called upon to decide were questions of law, namely, (1) what rate of exchange should the Court adopt in converting the amount of the defendants' indebtedness in marks into money of the United States, and (2) were the plaintiffs entitled to interest upon the indebtedness owing by the German firm during the period between April 6, 1917, and July 14, 1919, the first date being the date of the outbreak of war between the United States and Germany and the second being the date of the issuance of the general license by the War Trade Board permitting communication and commercial transactions between citizens of the United States and citizens of Germany.

The plaintiffs contended that the rate of exchange to be adopted should be the rate existing on the date of the breach of the contract to pay the amount due upon the account stated. The defendants contended that the rate of exchange to be adopted should be the rate existing at the date of the entry of the final decree. The District Court held (R. 11) that the proper rate of exchange was the rate as of the date of the breach of the

contract to pay upon the account stated, dated December 31, 1916, at which time the German mark was worth 18½ cents (R. 9).

Upon the question as to the running of interest the plaintiffs contended that they were entitled to interest upon their indebtedness for the entire period from December 31, 1916, to March 23, 1923, the date of the hearing. The defendants contended that no interest should be allowed for the period between April 6, 1917, and July 14, 1919. The District Court adopted the contention of the defendants on this point and refused to allow any interests for the period between April 6, 1917, and July 14, 1919. (R. 10.)

From the final decree of the District Court (R. 13) entered in accordance with the Court's opinion upon the questions referred to, the defendants appealed to the Circuit Court of Appeals on the ground that the District Court should have adopted the rate of exchange as of the date of the entry of the final decree. Plaintiffs prosecuted a cross-appeal from the decree of the District Court for its failure to allow interest upon their claims for the period between April 6, 1917, and July 14, 1919.

The Circuit Court of Appeals affirmed the decree of the District Court upon both questions. (R. 21 ff.) Thereupon the defendants filed their petition for writ of certiorari to review so much of the decision of the Circuit Court of Appeals as did not adopt the contention of the defendants



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that the rate of exchange to be used should be the rate existing at the date of the entry of the final decree, and the plaintiffs filed their petition for writ of certiorari to review so much of the decision of the Circuit Court of Appeals as held that they were not entitled to interest upon their claim for the period between April 6, 1917, and July 14, 1919.

Both petitions were granted by this Court, and both questions are therefore before the Court.

#### QUESTIONS PRESENTED

The questions presented in the case are:

(1) Where a debt is owing to a person in currency of a foreign country and suit is brought in a Court of the United States to recover the amount of the debt, as of what date should the rate of exchange be taken by the Court in converting into money of the United States, for the purpose of entering a decree or judgment, the amount of the debt which is expressed in foreign currency?

(2) May interest be recovered upon a debt owing by a citizen of one belligerent country to a citizen of the other during the period of war?

#### ARGUMENT

##### I

The district court in calculating the amount of the German firm's indebtedness in United States money should have adopted the rate of exchange existing at the date of the entry of the final decree

This question arises principally because a Court in the United States can not enter a decree or

judgment in foreign money. *The Edith* (1871), Fed. Cas. No. 4281; *Erlanger v. Avengno*, 24 La. Ann. 77; *Bronson v. Rodes* (1868), 7 Wall. 229; *Butler v. Horwitz*, 7 Wall. 258.

The authorities upon this question can not be said to be uniform. There would seem to be five possible rates of exchange which could be adopted for converting the amount of a debt in foreign currency into currency of the United States: (1) The rate of exchange prevailing at the date the payment should have been made or the cause of action accrued, or (2) the rate of exchange prevailing on the date the suit for recovery of the debt is commenced, or (3) the rate of exchange prevailing on the date the verdict or judgment is entered, or (4) the rate of exchange prevailing on the date the judgment is paid or execution made thereon, or (5) the rate of exchange most favorable to the plaintiff for a reasonable time after the breach of the obligation to pay. See *Columbia Law Review*, vol. 22, page 217.

The second and fourth suggested rates of exchange may be eliminated at once, as most of the authorities do eliminate them. The second suggestion is hardly tenable since the commencement of the suit means nothing more than the submission of the dispute for determination by a properly authorized tribunal, and to have put upon the obligation the official stamp of the State. The fourth suggested rate of exchange can



hardly be adopted, since prior to the date of the payment of the judgment or the execution thereon the old obligation has already been translated at the date of the entry of the judgment into an obligation payable in money of the United States, and the judgment could not have been entered in any other money. Hence, prior to the date of execution, the old obligation had been merged in an obligation payable in currency of the United States.

The fifth suggested rate of exchange seems not to have been adopted in any of the cases, but has been suggested by several writers on the analogy of the measure of damages in an action to recover damages for the conversion of stock in a corporation. The nearest approach to the use of the fifth suggested rate of exchange may be found in the case of *Butler v. Merchant*, 27 S. W. (Texas), 193, where the Court used a rate of exchange equivalent to the average between the rate of exchange existing at the date of the breach of the contract and the rate of exchange existing at the date of the institution of the suit. It hardly seems necessary to give the fifth suggested rate of exchange any consideration.

The question then reduces itself to one as to whether the rate of exchange prevailing at the date of the failure to pay or breach of contract should be used or the rate at the date when the verdict or judgment is entered. There would seem to-day to be no distinction between the date of the

verdict and the date of the judgment, as was pointed out by Rowlatt, J., in *Uliendahl v. Pankhurst Wright & Co.* (1923), 39 T. L. R. 628:

The phrase "the rate prevailing at the date of judgment" should really be "the rate prevailing at the date of the verdict"; to-day verdict and judgment usually come together, but in the old practice judgment did not come until the first day of the term following that in which a verdict was obtained, and it was the verdict that was the important matter.

Prior to the Great War, and consequently prior to the time when fluctuations in rate of exchange were so great that persons having obligations payable in German marks would receive almost nothing were they obliged to accept payment of the obligations owing to them in German marks, the authorities were few and were far from satisfactory. This was due in a large measure to the fact that fluctuations in exchange were rare, and such as there were made no material difference. The case of *Taan v. LeGaur* (1793), 1 Yeates (Pa.), 204, seems to be the earliest decision of an American Court upon the subject. This case held that the rate of exchange to be used was the rate existing at the date of the judgment. The earliest Federal case seems to be that of *Smith v. Shaw* (1808), 2 Wash. C. C. 167 (Fed. Cas. No. 13170), which also held that the rate of exchange existing at the date of the judgment was the proper rate.

None of the early opinions contain much reasoning as to why a particular rate of exchange should be adopted under such circumstances.

Although the question was not one of great importance in the earlier cases, it had protruded itself enough to cause comment by one of the great text writers of the Nineteenth Century. Justice Story in his "Conflict of Laws," seventh edition, Section 308, in commenting upon the principle laid down in the case of *Lee v. Wilcocks*, 5 Sergeant & Rawle (Pa.), 48, says:

In a late American case, where the payment was to be in Turkish piastres, but it does not appear from the report where the contract was made or was made payable, it was held to be the settled rule "where money is the object of the suit to fix the value according to the rate of exchange at the time of the trial." It is impossible to say that a rule laid down in such general terms ought to be deemed of universal application, and cases may easily be imagined which may justly form exceptions.

In the case of *Grant et al. v. Healey* (1839), Fed. Cas. No. 5696, which was decided by Mr. Justice Story, the learned text writer apparently adopted the rate of exchange prevailing at the date of judgment. In that case he said:

\* \* \* I take the general doctrine to be clear that whenever a debt is made payable in one country, and it is afterwards sued for in another country, the creditor is

entitled to receive the full sum necessary to replace the money in the country where it ought to have been paid, *with interest for the delay*; for then, and then only, is he fully indemnified for the violation of the contract. In every such case the plaintiff is therefore entitled to have the debt due to him first ascertained at the par of exchange between the two countries and then to have the rate of exchange between those countries added to or subtracted from the amount, as the case may require, in order to replace the money in the country where it ought to be paid. It seems to me that this doctrine is founded on the true principles of reciprocal justice. (Italics ours.)

Justice Story goes on the assumption in this case that the creditor of a foreign debtor is to be compensated for the delay in the payment of the obligation not by having imposed upon the debtor a new obligation to pay something he did not agree to pay but by having awarded to him interest for the period of the delay. See also *Cropper v. Nelson*, Fed. Cas. No. 3417; *Smith v. Shaw*, Fed. Cas. No. 13170.

Perhaps the leading case upon the subject prior to the time when the question as to rate of exchange became acute was a case decided by the Supreme Court of Wisconsin, *Hawes v. Woolcock*, 26 Wis. 629. In that case the court said:

Perhaps a strict application of logical reasoning to the question would lead to the

result that the premium should be estimated at the rate when the note fell due. That was when the money should have been paid and when the default in performing the contract occurred. This conclusion would be supported by the analogy derived from the rule of damages on contracts to deliver specific articles, fixing the market price at the time when they ought to have been delivered as the criterion. This rule might sometimes be to the advantage of the holder of the note, as in the present case. In other cases where the premium was less at the time the note became due than at the time of trial, it would be to his detriment. And in view of these uncertainties and fluctuations in the rate, upon grounds of policy as well as for its tendency to do as complete justice between the parties as is possible, we have come to the conclusion that the true rule in such cases is to give judgment for such an amount as will, at the time of the judgment, purchase the amount due on the note in the funds or currency in which it is payable. To accomplish this, of course, the premium should be estimated at the rate prevailing at the time of trial. By this rule the holder would neither gain nor lose by the fluctuations in the rate, but whenever he obtained a judgment would obtain it for a sum which would then procure him the exact amount to which he was entitled in the proper currency. This does complete justice between the parties, and seems, therefore, to indicate the true ex-

tent to which the difference of exchange in such cases should affect the amount of recovery.

See *Lee v. Wilcocks*, 5 Sergeant & Rawle 48; *Robinson v. Hall*, 28 How. Prac. 342. In *Scott v. Hornsby*, 1 Call. (Va.) 35, the Court said:

As to the other point (i. e., the rate of exchange) the sterling money was properly settled at the time of the judgment, because the rate of exchange was liable to fluctuation and therefore should be ascertained at the time when the plaintiff is to get his money.

See also *Comstock v. Smith*, 20 Mich. 338; *Murphy v. Camac*, Fed. Cas. No. 9948; *The Blohm* (1867) Fed. Cas. No. 1556; *Marbury v. Marbury* (1866), 26 Md. 8; *Hargrave v. Creighton* (1873), 1 Woods. 489 (Fed. Cas. No. 6064); *Capron v. Adams* (1868), 28 Md. 529; *Benners v. Clemens* (1868), 58 Pa. 24.

In the case of *Comstock v. Smith*, *supra*, where a contract, conditioned upon the payment in foreign money in a foreign country, was broken and suit brought in a Court in the United States, the Court charged the jury that if the plaintiff was entitled to recover upon the proofs in the case for breach of the contract declared upon, it being payable in lawful money of Canada, the plaintiff was entitled to recover the *present* value of Canadian currency as compared with legal tender notes of the United States; that is, that she was en-

titled to the premium which Canadian money was then worth over United States legal tender notes. The appellate court held that there was no error in this charge.

The foregoing cases, discussed and cited, either directly or inferentially hold that the proper rate of exchange to be adopted in converting the amount owing in foreign currency into money of the United States for the purpose of the entry of judgment is the rate of exchange existing at the date of judgment. These cases seem to represent the weight of authority in the American courts upon the subject prior to the Great War.

There were American cases, however, decided prior to the war which seem to take a contrary view. Amongst these are: *Spreckles v. The Weatherly* (1981), 48 Fed. 734; *Forbes v. Murray* (1869), 3 Ben. 497 (Fed. Cas. No. 4928); *Grunwald v. Freese* (1893), 34 Pac. (Calif.) 73; *McKiel v. Porter* (1842), 4 Ark. 534; *Hussey v. Farlow* (1864), 91 Mass. 263; *Stringer v. Coombs* (1873), 62 Me. 160; *Jelison v. Lee*, 3 Woodb. & M. 368.

Many of the pre-war cases on both sides of this question are unsatisfactory, and many of them can only be said to favor one or the other rule argumentatively.

The text writers, in so far as they adopt any rule, adopt the rule that the proper rate of exchange is the rate existing at the date of the trial or at the date of the actual payment of the money.

Section 213 of Sutherland on Damages, 4th edition (1916), states:

*Rate of Exchange.*—Where the debt is not only payable in the currency of a foreign country but is expressly or by implication also payable there, and not having been paid is sued in this country, the creditor is entitled to the money of the forum to a sum equal to the value of the debt at the place where it should have been paid. Where the creditor sues, the law ought to give him just as much as he would have had if the contract had been performed, just what he must pay to remit the amount of the debt to the country where it was payable. Hence he is entitled to recover according to the rate of exchange between the two countries at the time of the trial.

See also Section 274, Sedgwick on Damages, 9th edition (1912). Sedgwick is not altogether clear as to what he thinks is the proper rule, but he does seem to adopt the rule which holds that rate of exchange existing at the date of judgment is the proper one. The authority cited by Sedgwick for his general rule is *Marbury v. Marbury*, 26 Md. 8, which is a leading case for the judgment day rule.

It would seem, therefore, that prior to the Great War the weight of authority in the United States was that the rate of exchange prevailing at the time of judgment was the proper one to be adopted in calculating the amount of a judgment in United States money where the obligation sued upon was payable in foreign money.



The earlier English decisions seem to be as much confused as the American. The earliest case which has been found which could possibly have any bearing upon the subject is that of *Elkins v. East India Company* (1717), 1 P. Williams, 395. The words and expressions used in this case are somewhat ambiguous and might well be the subject of argument, but it seems fair to say that the Court in deciding the case adopted the rate of exchange existing at the time of the judgment. The money was owing and payable in the East Indies, and suit was brought in England. The entire judgment reads as follows:

Let the master see what was the interest on money during these years in the Indies and what is the charge of returning money from the Indies to England, and he is to allow Indian interest, deducting out of it the charge of returning.

The use of the present tense by the court when it says that the master is to ascertain what *is* the charge of returning money from the Indies to England would seem to mean the charge at the time judgment was entered.

The case of *Scott v. Bevan* (1831), 2 Barnwall & Adolphus, 78, has been frequently cited as authority for both rules. The decision is somewhat confused in view of the fact that suit was instituted in England upon a judgment obtained in Jamaica, and it is not altogether clear in the case when the words "date of judgment" are used with respect

to the question of the rate of exchange, whether the date of the judgment in Jamaica is referred to, which, of course, would be the date of the breach, or whether the date of the judgment then being rendered in the English Court is referred to.

The case of *Delegal v. Naylor* (1831), 7 Bing. 460, decided the same year as *Scott v. Bevan*, *supra*, although not entirely clear, seems to adopt the rate of exchange existing at the date of judgment. The old case of *Cash v. Kennion* (1805), 11 Vesey 314, like *Scott v. Bevan*, has been cited by the proponents of both rules. The case, as a matter of fact, is of little assistance upon the present question to anyone.

Coming down to more recent decisions, the last English case upon the subject prior to the very recent cases, which will be discussed presently, was the case of *Manners v. Pearson* (1898), 1 Ch. Div. 581. In view of the fact that the *Manners* case, in its proper interpretation, clearly lays down the rule that the rate of exchange prevalent at the date of judgment is to be adopted under circumstances such as the present, and in view of the still further fact that the English courts, including the House of Lords, have been at great pains in their endeavors to distinguish the *Manners* case from recent cases in which they have decided contrary to the *Manners* case, it will be interesting to examine that case somewhat carefully.

In the Manners case the decision was by a court divided two to one. The recent English cases have referred more to the opinion of the minority Judge, Vaughn Williams, than to the majority opinion. This is due to the fact that the English courts in the recent English cases have not desired to follow the majority opinion, but have hesitated flatly to overrule it. That case was an action for a breach of contract to pay for labor. The contract, dated October 6, 1891, was entered into in Mexico between the plaintiff's deceased and the defendants. The plaintiff's deceased signed the contract in Mexico and the defendants in London. By it the defendants agreed to pay the deceased (1) the sum of £595 17s. 6d., in English money, on the execution of the agreement, and (2) one cent in Mexican currency for every cubic meter of certain excavation works mentioned in the agreement, which money was payable from time to time as and when the same should be received by the defendants from the Junta or Committee of Management of the drainage works of the city and valley of Mexico. The sum to be paid upon the execution of the contract was duly paid. The sums, however, provided for under the second portion of the contract were not paid.

On June 11, 1896, the personal representative of the deceased brought an action for account. The action did not come on for trial until November 4, 1897. The defendants kept their accounts in

Mexican dollars. On November 13, 1897, in order to avoid having the account taken in chambers, the defendants delivered an account showing that a balance of \$19,366 in Mexican currency was due on August 31, 1896, to the estate represented by the plaintiff, which sum they offered to pay in dollars on November 13, 1897. The plaintiff in the case contended that the balance due on the account ought to be turned into English money on August 31, 1896, when the account was completed. At that date the Mexican dollar was worth 2s. 6d. The defendants, on the other hand, contended that the balance ought to be turned into English money on November 13, 1897, when the actual amount was first ascertained and when the dollar was worth only 1s. 6¼d. The court found in favor of the contention of the defendants, and this was affirmed on appeal.

It has been repeatedly sought by these who disfavor the use of the rate of exchange prevailing at the date of judgment to distinguish this case on many grounds, the principal ground being that of procedure. However, the case stands for the proposition that where amounts of money are due in foreign currency at a specific time and are not paid, and later the court enters judgment for all these various amounts, the rate of exchange adopted will be the rate as of the entry of the judgment. These are the facts and the decision in the case, and therefore the case must stand for the proposition that, regardless of the date of

breach, the rate of exchange prevailing at the date of judgment should be adopted.

The recent American decisions are not in accord upon this question. There are a number of decisions holding that the proper rate of exchange to adopt under circumstances such as the present is the rate at the date of judgment or decree. There are others which hold that the rate as of the date of the breach of contract or the date the cause of action accrued is the proper rate. In the latter cases the decisions are for the most part a result of following the case of *Owners of S. S. Celia v. Owners of S. S. Volturno*, 1921, L. R. 2 App. Cas. 544, decided by the House of Lords, and which was a case sounding in tort. This case will be discussed later.

In *The Hurona*, 268 Fed. 910, decided in the District Court of the United States for the Southern District of New York by Judge Augustus N. Hand on April 3, 1920, where certain advances had been made to the master of a vessel amounting to 119,077.65 francs between July 3 and July 12, 1919, the court held that in a proceeding instituted in rem to recover the amount of the advances the rate of exchange prevailing at the date of the entering of the decree should be adopted. The court in reaching its decision cited the case of *Grant v. Healey*, *supra*, and *Hawes v. Woolcock*, *supra*.

On the same day in the same court the same judge handed down a decision in the case of *The*

*Verdi*, 268 Fed. 908, where the suit was to recover damages for a collision off quarantine anchorage, Staten Island, New York, on September 21, 1915. The vessels were each British owned. The temporary repairs and expenses in New York were \$1,509. The permanent repairs and expenses were incurred in England, and were paid for there on or about January 1, 1915, in British currency, amounting to £1,791.2.6. The demurrage in New York and England occasioned by the collision amounted to £6,478.0.9. The Commissioner converted these sums into American dollars at \$4.74 per pound sterling, the rate of exchange on January 1, 1916, the date upon which it was apparently assumed by the parties that all the damages were ascertainable. Judge Hand in deciding the case had before him the correctness of the commissioner's ruling as to the rate of exchange. The question was whether the rate of exchange should be the rate determined by the commissioner or the rate at the time of the entry of the decree. Judge Hand confirmed the commissioner's report, and in so doing said:

It is contended that the damages can not be determined until final decree because the action sounds in tort, and that the rate of exchange then prevailing should therefore be adopted. This somewhat archaic argument, if pushed to an extreme, would bar interest prior to the date of the decree. The parties, however, have selected January 1, 1916, as the date to fix the amount

of their damages in pounds sterling. The case is not one of transmitting these pounds sterling to New York but of finding their equivalent in dollars on January 1, 1916. This can only be done by employing the rate of exchange prevalent at that date. The matter is quite different from one of a continuing obligation to pay pounds sterling in England, the failure to perform which would be compensated for by interest. Here the obligation was to pay dollars in New York. Failure to pay them is similarly compensated for by interest, but as the initial damages were calculated in pounds they must be converted into dollars at the value the pounds had at the time and place of payment. That is measured by the rate of exchange then prevailing.

These two cases, being decided by the same court on the same date, are interesting in that the court reaches one conclusion in the case where damages in tort are sought to be recovered and another conclusion in a case in which it is sought to recover the amount of a debt. Judge Hand, with one exception, is the first judge to recognize the distinction in such cases as these between actions in tort and actions for the payment of debts, and it is because of the failure of the courts to recognize these distinctions and an apparent desire to prevent loss by persons who have dealt in foreign currency, which has depreciated, that has led the courts astray.

In the case of *Page v. Levenson et al.*, 281 Fed. 555, decided by Judge Rose in May, 1922, in the United States District Court for the District of Maryland, it was held that the rate of exchange to be used in calculating an amount due in French currency is the rate prevailing at the time of breach of contract. Judge Rose based his decision largely upon the decision of the House of Lords in the case of *S. S. Celia v. S. S. Volturno*, *supra*. That the Judge himself recognized the difficulties involved and that it was practically an impossibility to answer the contentions contrary to the court's opinion is shown by the following passage:

To avoid such possibilities it has sometimes been suggested that the date at which the foreign money should be valued is that at which suit was brought. Moreover, it is forcibly urged that the only reason why the courts do not give the plaintiff precisely what belongs to him is that they lack the power to enter a judgment in any currency except their own. If they could give him a judgment in francs, marks, lire, or rubles, they would do so. Why not, then, enter up for him one for so many pounds or dollars as will, on the day the judgment is rendered, buy for him the precise number of francs, marks, lire, or rubles to which he is admittedly entitled? Probably no altogether satisfactory answer can be given to this argument, except, perhaps, that in actual practice greater hardship may be inflicted by fixing the date of trial as that upon which the



conversion of the currency should be made, as when, in the case already cited, it was held that the English debtor had the right, by tendering Soviet rubles, to redeem its bonds held by a third party as security for the repayment of the gold rubles once lent it.

The decision in the Page case is of little assistance in a discussion of the proposition involved. In *Liberty National Bank of New York v. Burr*, in the District Court of the United States for the Eastern District of Pennsylvania, 270 Fed. 251, an action was brought at law in assumpsit, and the question came up on a rule for want of a sufficient affidavit of defense. The suit was on a bill of exchange drawn and accepted in London, and made payable there in pounds sterling. It was held that leave to the plaintiff would be granted to move for judgment on a sum based on the rate of exchange prevailing at the time judgment was entered. Amongst other things, the court said:

This controversy suggests many academically interesting questions and raises some of great practical importance.

The history of any such transaction discloses several different dates, beginning with the date of the promise and including that of maturity, demand, action brought, and the date of trial. The adjudged cases deal with transactions which are unlike in some features. These unlike features may

affect the place of payment, a promise expressed in our own or a foreign money of account, or other points of difference. There are at least hints of distinction based upon the form and nature of the promise in respect to whether it takes the form of a promissory note or the acceptance of a bill of exchange. There are cases also of a promise to pay in a currency, which is what is called depreciated at the time of the making of the promise, or is such at a later date. There are also cases which are *sui generis*, such as the Confederate money cases.

The English cases must be read with the thought in mind that they are considered from the viewpoint of the fixed idea of the absolute stability of the pound sterling, and that it is an unvarying standard of value. \* \* \*

The Pennsylvania cases supply us with a very meager discussion of the principles on which the rulings may rest. *Lee v. Wilcocks*, 5 Serg. & R. (Pa.) 48, is ruled on the *ipse dixit* of Chief Justice Gibson that, in cases of promise to pay in foreign money, it was the settled rule to base a finding of the sum recovered upon the rate of exchange prevailing at the trial. \* \* \*

Counsel have cited a number of other cases ruled in different jurisdictions. These we have had no opportunity to examine. There would seem, however, to be a lack of uniformity among them. We are, in consequence, taken back to *Lee v. Wilcocks*,

as the only light judicially shed upon the question. It is to be regretted that we have no statement from Chief Justice Gibson of the principle upon what the (*sic*) terms the "settled rule" is based. \* \* \*

After discussing four possible principles \* \* \* we follow the rule laid down in *Lee v. Wilcocks*, which we accept as the established rule in Pennsylvania. It meets the test applied in some of the cases in other jurisdictions that the amount of the judgment entered should be the equivalent of what the plaintiff would recover if the suit was brought in the jurisdiction in which the obligation was assumed and in which it was payable. \* \* \*

In the case of *Saigon Maru* (1920), 267 Fed. 881, the rate of exchange existing at the time of the final decree was adopted in converting a claim for damages in foreign currency into currency of the United States.

New York has adopted the breach date rule. In *Hoppe v. The Russo-Asiatic Bank*, 200 App. Div. 460, aff. 235 N. Y. 37, the Court of Appeals of New York said:

In an action properly brought in the courts of this State by a citizen or an alien to recover damages, liquidated or unliquidated, for the breach of contract or for a tort where primarily the plaintiff is entitled to recover a sum expressed in foreign money in determining the amount of the judgment expressed in our currency, the rate of ex-

change prevailing at the date of the breach of contract or at the date of the commitment of the tort is, under ordinary circumstances, to be applied.

The New York Courts were not, however, in accord upon the subject until the decision of the Court of Appeals. See *Gross v. Mendel*, 171 App. Div. 237; *Sirie v. Godfrey*, 196 App. Div. 529; *Revillon v. Demme*, 114 Misc. 1.

The English courts, since the outbreak of the Great War, have finally adopted the rule that the rate of exchange existing at the date of the breach of the contract to pay or the commission of the tort, is the proper rate to be used in computing in the money of the forum the amount of a debt or tort in foreign currency. The English courts did not arrive at this conclusion, however, immediately. In the case of *Kirsch & Co. v. Allen* (1919), 36 F. L. R. 59, the Court adopted the rate of exchange existing on the day of judgment. (This case was reversed on other grounds.) However, the English courts soon abandoned this rule. The case which is most often cited as representing the authority in England is a decision of the House of Lords, namely, the *Owners of the S. S. Celia vs. Owners of the S. S. Volturno* (1921), 1 F. R. 2 App. Cas. 544. In that case the action arose out of a collision which occurred in the Mediterranean Sea between the English steamship *Celia* and the Italian steamship *Volturno*. The trial court held both ships equally to blame and re-

ferred the question of damages to the registrar. The cross-claims for damages were agreed, subject to a question with respect to the rate of exchange raised by the owners of the *Volturmo* as to one item of their claim which was expressed in lire. The question was whether in calculating the amount which the respondents, the owners of the *Volturmo*, were entitled to recover from the appellants, the owners of the *Celia*, in respect to damages for the use of their vessel, the rate of exchange to be taken should be that existing at the time the loss was incurred or at the time of the assessment or payment. The trial court held that the rate of exchange in respect of the claims for detention should be fixed as at the periods of detention. This was affirmed by the Court of Appeal and upon appeal to the House of Lords the appeal was dismissed, four of the justices holding in favor of the rule that the rate should be fixed as of the periods of detention and one justice dissenting.

It is to be noted that this was an action sounding in tort and may well be distinguishable from actions for the payment of simple debts. It is submitted, however, that, regardless of the majority opinion, Lord Carson, in his dissenting opinion, had all reason in his favor. He said:

I am, therefore, of opinion that the contention of the appellants is well founded and that the true rule ought to be that the foreigner should, when the damages as assessed or agreed upon are in foreign cur-

rency, receive under the judgment neither more nor less than that sum, and that the proper date to ascertain this is when the entry of judgment is being made for the purpose of making the judgment available.

It may be said that where the rate of exchange has gone against the lira the delay has prejudiced the applicant. I do not think that can be considered, as the rule which has been applied must plainly apply whether the exchange is adverse or otherwise. But in any event to assign this as a reason for the rule would be in reality to give damages for nonpayment, which, except under special circumstances, are never awarded in our courts. (For instance, see the judgment of Bailhache, J., in *Barry v. Van den Hurk* (1).)

In *Manners v. Pearson* (2), Lindley, M. R., says:

“To substitute English money for Mexican dollars every time a payment ought to have been made is not to take an account of what is due under the contract, but to give damages for every breach of it which the plaintiff can prove that the defendants committed, which is a totally different matter.

“I have examined the judgments delivered by the Court of Appeal in *Di Ferdinando v. Simon, Smits & Co.* (3), and also the judgments in *Lebeaupin v. Crispin & Co.* (4) and in *Barry v. Van den Hurk* (1), all decided in 1920, but although they all seem to

me to lay down and assert the same rule as that upon which Hill, J., following some of these judgments, acted and which I have already considered. I do not think the learned judges who decided them rest their judgments on any authorities, but rather assume that such a rule existed, or ought, as a matter of principle, to exist. The only case apart from the recent authorities to which I have referred which seems to me to give us any assistance is the case of *Manners v. Pearson* (2), from which I have already quoted."

See also *Lebeaupin v. Crispin & Co.* (1920), 2 K. B. D. 714; *Di Ferdinando v. Simon, Smits & Co.* (1920), 3 K. B. D. 409; *Société des Hotels du Touquet-Paris-Plage v. Cummings* (1921), L. R. 3 K. B. D. 459; *in re British American Continental Bank Ltd. Goldziehr & Pinso's Claim* (1922), 2 Ch. 575; *Uliendahl v. Pankhurst Wright & Co.* (1923), 39 T. L. R. 628; *Barry et al. v. Van den Hurk* (1920), 36 T. L. R. 663.

The following American cases, besides the ones already cited, adopt the breach date rule: *Simonoff v. Bank* (1917), 279 Ill. 248; *Rasst v. Morris* (1919), 135 Md. 243; *Katcher v. American Express Co.* (1920), 94 N. J. Law 165; *Wormser v. Marroquin*, 249 Fed. 428; *Dante v. Miniggio* (1924), 298 Fed. 845; *Wichita Mill & Elevator Co. v. Naamlooze, etc.*, 3 Fed. (2d) 931.

This Court has not passed upon the question of the rate of exchange raised in this case. The

nearest approach to a consideration of the question by this Court is found in the case of *Birge-Forbes Company v. Heye*, 251 U. S. 317. In this case the amount of the claim was expressed in marks, and the question seems to have arisen as to the method of computing the value of the marks in currency of the United States. However, there was no evidence as to the value of the mark at any particular time. There being no such evidence, this Court held:

The same is true with regard to the taking of the value of the German mark at par value in the absence of evidence that it had depreciated at the time of the plaintiff's payments.

It will be apparent from this that the Court did not have before it the question of the rate of exchange to be adopted where it appeared in the evidence that the foreign currency in which the claim of the plaintiff was expressed had depreciated.

It will, of course, be apparent from an examination of the cases cited above, which have been decided since the outbreak of the Great War, that the decided weight of authority is in favor of the rule that the rate of exchange existing at the date of the breach of the contract is the proper one. On the other hand, it would seem, in so far as the cases prior to the war are helpful, that the rule prior to that time was that rate of exchange prevalent at the date of judgment is the correct one.



And it is interesting to note that some of the old cases which adopt the latter rule gave the same reason for adopting it as do many of the modern cases for adopting the former, namely, that the plaintiff should not be penalized for the failure of the defendant to pay his obligation, the situation being in the older cases that it was more advantageous to the plaintiff to have the rate of exchange existing at the time of judgment used, whereas in the modern cases the contrary is true, it being more advantageous to the plaintiff to have the rate existing at the time of the breach of obligation used. There must be a correct rule based upon reasoning which will be applicable under all circumstances.

The only thorough discussion of the subject is by Edward Gluck in an article in 22 *Columbia Law Review*, on page 217, entitled "The Rate of Exchange in the Law of Damages." The author is a proponent of the modern theory. He endeavors to justify his theory upon the general rule of damages relative to breach of contract by a seller to deliver goods. He likens the marks which are to be paid under a contract to commodities which are to be delivered pursuant to contract, and from this analogy he draws the conclusion that where there is a breach of contract to pay an obligation owing in marks, the value of the marks as of the date of the breach of the contract to pay should be adopted in converting marks into money of the United States.

This, however, is not an application of the general rule of damages. The general rule of damages is that the amount which the plaintiff will recover in an action against the seller for failure to deliver goods will be the difference between the contract price and the market price at the time of the breach.

In a suit to recover the amount of an obligation owing in marks or any other foreign currency, the plaintiff is not suing to recover loss he has incurred by reason of the failure of the defendant to deliver a commodity, and it is perfectly apparent that the general rule of damages will not apply for the very reason that there is no contract price of the marks to be delivered. Hence, the difference between the contract price of the so-called commodity and the market price can not be found. As a matter of fact the parties did not make their contract with a view to treating the currency dealt with in the contract as a commodity. The parties intended the foreign currency to be treated as money.

There may be much reason in a suit to recover damages for tort injuries where the amount of the damages is expressed in foreign currency, to adopt the rate of exchange existing at the date of the commission of the tort, as the proper rate, since in such instances the Court is endeavoring to secure the payment to the plaintiff of compensation for the injuries done. In the case of a breach of contract to pay money the situation is somewhat

different. While it may be true, as the learned judge of the District Court stated, that in the case of a breach of contract to pay money a new right, namely, the right of damages, is created by the breach of contract, and it is not a question of enforcing the payment provided for in the contract, it is also quite true that while there may be a right of action for damages under such circumstances, the damages to be recovered are merely nominal. Chitty in his Treatise on Pleading, 16th edition, vol. 1, page 121, says with respect to the action of debt:

This action is so called because it is in legal consideration for the recovery of a *debt eo nomine* and *in numero*; and though *damages* are in general awarded for the detention of the debt, yet in most instances they are merely nominal and are not, as in *assumpsit* and *covenant*, the principal object of the suit; and though this distinction may now be considered as merely technical, where the contract on which the action is founded is for the payment of money, yet in many instances we shall find it material to be attended to.

The only recompense which the law recognizes for failure to pay the amount of a debt is the payment of interest. When the parties made their contract they contracted with respect to a specific currency. The mere fact that a court in the United States, for reasons of policy, can not give judgment in a foreign currency should not

affect the fundamental nature of the obligation of the defendant. The obligation of the defendant is to pay marks; and although he may have committed a breach of contract for failure to pay the marks on the date they were due, the right of action which accrued is in its nature a right of action to recover damages expressed in marks, and while there may be damages for failure to pay, these damages, as Chitty remarks, are merely nominal.

The right of action to recover marks continues on down to the very time that the judgment is to be entered. The court in the trial of the action must find first how many marks are due as a result of the breach of contract. The court, in the very nature of things, must consider the action as an action to recover marks, and it is impossible to arrive at a result without taking into consideration the number of marks that are due. When the court proceeds to enter judgment it should then consider the subject as if the defendant were about to pay his obligation, which payment would be made in marks, and the value of those marks as of that moment in American money is the amount the plaintiffs should recover in American money.

To adopt any other theory is to say that when a person who owes an obligation in marks breaks his contract to pay the marks there arises against him a right of action by the plaintiff in dollars, in the event that the defendant is dealing with a

citizen of the United States. There would seem to be just as much logic to say that a right of action to recover damages in any other currency arose, judged by the citizenship of the putative plaintiff.

It would, therefore, seem that the older rule, namely, that the rate of exchange as of the date of the judgment should be used in making such a computation, is the correct rule on strict reasoning. This would be adopting the rule laid down in *Grant v. Healey, supra*, and *Hawes v. Wilcocks, supra*, and would be in accord with the well-reasoned dissenting opinion of Lord Carson in the case of *S. S. Celia v. S. S. Volturno, supra*. The modern cases for the most part do not express clear reasons for adopting the breach-day rule, and, as has been noted, the reasoning laid down in the only recent article on the subject will not stand if pushed to its logical conclusion.

The better text writers also adopt the rate of exchange existing at the date of trial or judgment.

For comments upon the subject see notes in the following publications:

- 29 Harvard Law Review, 873.
- 34 Harvard Law Review, 422 and 435.
- 20 Columbia Law Review, 914 and 922.
- 31 Yale Law Journal, 198.
- 19 Michigan Law Review, 652.
- 68 Pennsylvania Law Review (59 American Law Register), 395.
- 37 Law Quarterly Review, 38.

## II

The plaintiffs are not entitled to recover interest upon their debt for the period between April 6, 1917, and July 14, 1919

The common law as to the suspension of interest upon obligations existing between citizens of hostile belligerent countries is clear. The common law is that interest upon such obligations is suspended during the period of war. The leading case bearing out this proposition is that of *Brown v. Hiatts*, 82 U. S. 177. The reason for this rule is that communication between citizens of hostile belligerent countries having become illegal it becomes legally impossible for the debtor to pay his debt or the creditor to receive it, and since interest is charged for the withholding of payment of a debt it would be inequitable to make the charge when it is legally impossible to pay the debt. Some of the cases decided under the common law seem to ingraft upon the general principle an exception, namely, that when a debt does not mature and would not be payable even though war were not in existence, the interest runs until the date of maturity even though war exists between the countries of the parties concerned. It is of interest to note, however, that the court in *Brown v. Hiatts*, *supra*, sets forth this exception to the general rule, and although in that case the indebtedness sued upon was an obligation which did not mature until thirty days after the Civil War began, the Court held that interest was suspended from the begin-

ning of the war. The decision of the Court, therefore, was directly contrary to the expressions of opinion given by it. It may safely be said, however, that the general rule is that upon all ordinary current indebtednesses interest is suspended from the date of the outbreak of war. *Hoare v. Allen*, 2 Dallas, 102; *Jackson Insurance Co. v. Stewart*, 1 Hughes, 310; *Mayer v. Reed*, 37 Ga. 482; *Roberts, Adm., v. Cocks*, 28 Gratt. 207; *Biglar v. Waller, Chase*, 316.

This being the rule of the common law, it then becomes necessary to ascertain whether or not the provisions of the Trading with the Enemy Act have materially changed this rule of law. The reason the common law refuses to permit interest to run upon an obligation owing by a citizen of one belligerent country to a citizen of the other is because it is impossible for the debtor legally to discharge his obligation, and it would therefore be inequitable to charge him interest for failure to pay. Unless the Trading with the Enemy Act makes it possible for a German debtor of an American creditor legally to pay his obligation, then the common-law rule has not been changed by the Act.

The only provision in the Trading with the Enemy Act which permits the discharge of a debt owing by an enemy to a citizen of the United States is the provision of Section 9 of the Act which permits the filing of a claim by the creditor and the collection of the obligation out of property

of the enemy seized by the Alien Property Custodian. The creditor, however, under these circumstances may collect his debt only in the event that the particular German has property in the United States which has been seized by the Alien Property Custodian. It is conceivable that there are hundreds of German debtors who had no property in the United States subject to seizure. Still, even where Germans had property in the United States subject to seizure, whether or not it would be seized was discretionary with the Alien Property Custodian, acting for the President.

Unless the common-law rule is adhered to in all cases, to permit interest to run during the period of the war on debts which are collected pursuant to Section 9 of the Trading with the Enemy Act would be to adopt one rule as to interest where a particular German debtor had property in the United States which had been seized and to adopt another rule in those cases where a German debtor had no property in the United States which was subject to seizure.

If the conclusions reached above are sound, then the question arises as to the period for which interest does not run. As indicated above, the reason for the rule is that it is illegal for the debtor to pay his debt to the enemy and illegal for the creditor to receive it. There is no question but that the date when the interest stopped running



was April 6, 1917, when war was declared between the United States and Germany.

Peace was not declared until July 2, 1921. However, on July 14, 1919, the War Trade Board issued a general license permitting trade with Germany. It then became legal for debtors and creditors of the two countries to settle their obligations. It might well be said that this is the last date upon which interest did not run, because of the fact that thereafter it became legal to pay debts and to receive the payment, and the reason for the rule in *Brown v. Hiatts* does not apply.

✓ In the case of *Miller v. Robertson*, 266 U. S. 243, which was a suit under Section 9 of the Trading with the Enemy Act to recover an indebtedness, this Court allowed interest. The Robertson case, however, is distinguishable from the present case. The Circuit Court of Appeals in the Robertson case (286 Fed. 503) allowed interest on the theory that an agent of the enemy debtor was present in this country during the war with funds out of which interest could have been paid. This Court affirmed the Circuit Court of Appeals decision in the matter.

✓ The propriety of allowing interest upon an indebtedness owing by an enemy for the period of the war where an agent is present in the country with funds in his possession with which to pay the interest, is based on the decision of this Court in the case of *New York Life Insurance Co. v. Davis*, 95 U. S. 425. In the present case,

however, there is no evidence, and it is apparently not a fact that the enemy debtor had an agent in this country of any kind. The rule, therefore, laid down by this Court in the Robertson case is inapplicable to the present case.

### III

**The treaty of peace between the United States and Germany signed on August 25, 1921, has no application to the questions involved in this case**

The Treaty of Peace between the United States and Germany signed August 25, 1921, and proclaimed on November 14, 1921 (42 Stat. L. 1939), incorporated certain provisions of the Treaty of Versailles (Senate Document No. 85, 66th Congress, First Session). Amongst other provisions of the Treaty of Versailles thus incorporated was Part X. (The Appendix hereto contains Article 243 of Part VIII and Sections III and IV of Part X of the Treaty of Versailles. These portions of the Treaty of Versailles contain all the provisions which might in any way be relevant to the discussion in this case.)

It is conceded that in so far as applicable to the questions here involved the provisions of the Treaty of Versailles incorporated in the Treaty of Peace between the United States and Germany are binding upon this Court and are part of the supreme law of the land.

It is the contention of the plaintiffs that paragraph 14 of the Annex to Section IV of Part X

makes provision for the rate of exchange and the rate of interest which is to be used with respect to claims such as the plaintiffs' in this case, Paragraph 14 of the Annex to Section IV of Part X is as follows:

The provisions of Article 297 and this Annex relating to property, rights, and interests in an enemy country, and the proceeds of the liquidation thereof, apply to debts, credits, and accounts, Section III regulating only the method of payment.

In the settlement of matters provided for in Article 297 between Germany and the Allied or Associated States, their colonies or protectorates, or any one of the British Dominions or India, in respect of any of which a declaration shall not have been made that they adopt Section III, and between their respective nationals, the provisions of Section III respecting the currency in which payment is to be made, and the rate of exchange and of interest shall apply unless the Government of the Allied or Associated Power concerned shall within six months of the coming into force of the present Treaty notify Germany that the said provisions are not to be applied.

The specific provisions as to rate of exchange in the Treaty of Versailles are to be found in Subdivision (d) of Article 296, which is part of Section III. This is as follows:

Debts shall be paid or credited in the currency of such one of the Allied and

Associated Powers, their colonies or protectorates, or the British Dominions or India, as may be concerned. If the debts are payable in some other currency they shall be paid or credited in the currency of the country concerned, whether an Allied or Associated Power, Colony, Protectorate, British Dominion, or India, at the pre-war rate of exchange.

For the purpose of this provision the pre-war rate of exchange shall be defined as the average cable transfer rate prevailing in the Allied or Associated country concerned during the month immediately preceding the outbreak of war between the said country concerned and Germany.

If a contract provides for a fixed rate of exchange governing the conversion of the currency in which the debt is stated into the currency of the Allied or Associated country concerned, then the above provisions concerning the rate of exchange shall not apply.

In the case of new States the currency in which and the rate of exchange at which debts shall be paid or credited shall be determined by the Reparation Commission provided for in Part VIII (Reparation).

Article 296, however, makes provision for the settlement of debts payable before the war and due by a national of one of the contracting powers residing within its territory to a national of an opposing power residing within its territory. The provision made for the payment and collection of

such debts was the establishment of a clearing house. The rate of exchange provided was the rate to be used in the settlement of debts in such a clearing house. It was further provided in Article 296 that the provisions of the Article did not apply as between Germany on the one hand and any of the Allied and Associated Powers unless within a period of one month from the deposit of the ratification of the present treaty notice to that effect is given to Germany by the Government of the power adopting the provisions. No notice was ever given to Germany by the United States that the United States adopted the provisions of Article 296, hence the provisions of Article 296 do not apply to the United States, and no debts existing between nationals of the United States and nationals of Germany are settled by the clearing house. *The very fact that this suit is brought under Section 9 of the Trading with the Enemy Act to collect this debt is conclusive of that, since paragraph 3 of the Annex to Article 296 makes provision that the parties to the clearing-house arrangement will prohibit within their territory all legal process relating to the payment of enemy debts except in accordance with the provisions of the Annex.*

Plaintiffs in this case do not contend that Article 296 is binding upon the United States. They do say, however, that paragraph 14 of the Annex to Section IV of Part X makes provision as to

the rate of exchange to be used and interest to be allowed upon claims other than those provided for in the clearing-house arrangement. Claimants, however, fail to note the specific references in paragraph 14. That Subdivision says:

The provisions of Article 297 and this Annex relating to property, rights, and interest in an enemy country and the proceeds of the liquidation thereof apply to debts, credits, and accounts, Section III regulating only the method of payment.

Reference to Article 297 (see Appendix) will show that that section had no reference whatsoever to the payment of debts of a German due an American citizen. Article 297 is a part of Section IV, which is headed "Property, Rights, and Interests." Section 297 provides entirely for the dealing with and liquidation of property belonging to nationals of the Allied and Associated Powers, which property was in Germany during the war, or property of Germans which was within the territory of the Allied and Associated Powers during the war. It is perfectly true that paragraph 14 of the Annex to Section IV includes debts, credits, and accounts, but that is a provision that Article 297, which does not deal with payment of debts as between nationals of the various powers, shall include within its scope not only tangible property within the various countries but also intangible. For instance, it means that the provisions of Article 297 shall permit

the liquidation and dealing with the credits of Germans within the United States during the war or held by the United States during the war under the provisions of Subdivision (b) of Article 297. Credits are made property within the meaning of Article 297.

Further, paragraph 14 provides that in the matters provided for in Article 297 between Germany and the Associated States and between their respective nationals the provisions of Section III respecting the currency in which payment is to be made and the rate of exchange and interest shall apply unless the Governments of the Allied or Associated Powers concerned shall within six months of the coming into force of the present treaty notify Germany that said provisions are not to be applied. Paragraph 14 simply provides that in the settlement of matters provided for in Article 297 the provisions as to the rate of exchange and interest provided for in Section III shall apply. It must, therefore, be ascertained what the matters provided for in Article 297 are. Article 297 is set forth in full in the Appendix hereto, and it will not be necessary to go into all the provisions thereof. Attention, however, is called to the fact that Subdivision (b) of Article 297 provides for the liquidation by the Allied and Associated Powers of all property, rights, and interests belonging, at the date of the coming into force of the present treaty, the German nationals or companies controlled by them within the territories of the

Allied and Associated Powers. Here, then, is one place where the provisions as to the rate of exchange and interest provided for in Section III and made applicable to Article 297 by paragraph 14 of the Annex to Section IV apply, viz, in the liquidation of properties of Germans within the United States. Subdivision (e) of Article 297 provides that the nationals of the Allied and Associated Powers shall be entitled to compensation in respect of damage or injury inflicted on their property, rights, or interests, including any company or association in which they are interested in German territory as it existed on August 1, 1914. Here is another place where the rate of exchange and interest provisions apply, viz, when Germany liquidates the property of American nationals, which property was in Germany as of August 1, 1914, Germany must use the rate of exchange and rate of interest provided for in Section III. And so all the provisions of Article 297 might be discussed to show that Subdivision 14 of the Annex to Section IV has no application whatsoever to a suit under Section 9 of the Trading with the Enemy Act where the object of the suit is to collect a debt owing to an American citizen out of the property of an enemy in the United States which has been seized by the Alien Property Custodian. Such a procedure does not approach, nor is it similar in any way to, anything provided for in Article 297 of the Treaty of Versailles.



The further contention is made that Subdivision (2) of Section (h) of Article 297 also makes provision for cases such as the present. Subdivision (2) of Section (h) of Article 297 provides:

As regards Powers not adopting Section III and the Annex thereto, the proceeds of the property, rights, and interests, and the cash assets, of the nationals of Allied or Associated Powers held by Germany shall be paid immediately to the person entitled thereto or to his Government; the proceeds of the property, rights, and interests, and the cash assets, of German nationals received by an Allied or Associated Power shall be subject to disposal of such Power in accordance with its laws and regulations and may be applied in payment of the claims and debts defined by this Article or paragraph 4 of the Annex hereto. Any property, rights, and interests or proceeds thereof or cash assets not used as above provided may be retained by the said Allied or Associated Power, and if retained the cash value thereof shall be dealt with as provided in Article 243.

In the case of liquidations effected in new States, which are signatories of the present Treaty as Allied and Associated Powers, or in States which are not entitled to share in the reparation payments to be made by Germany, the proceeds of liquidations effected by such States shall, subject to the rights of the Reparation Commission

under the Present Treaty, particularly under Articles 235 and 260, be paid direct to the owner. If, on the application of that owner, the Mixed Arbitral Tribunal provided for by Section VI of this Part, or an arbitrator appointed by that Tribunal, is satisfied that the conditions of the sale or measures taken by the Government of the State in question outside its general legislation were unfairly prejudicial to the price obtained, they shall have discretion to award to the owner equitable compensation to be paid by that State.

Paragraph 4 of the Annex to Article 297 is as follows:

All property, rights, and interests of German nationals within the territory of any Allied or Associated Power and the net proceeds of their sale, liquidation, or other dealing therewith may be charged by that Allied or Associated Power in the first place with payment of amounts due in respect of claims by the nationals of that Allied or Associated Power with regard to their property, rights, and interests, including companies and associations in which they are interested, in German territory, or debts owing to them by German nationals, and with payment of claims growing out of acts committed by the German Government or by any German authorities since July 31, 1914, and before that Allied or Associated Power entered into the war.

The amount of such claims may be assessed by an arbitrator appointed by Mr. Gustave Ador, if he is willing, or if no such appointment is made by him, by an arbitrator appointed by the Mixed Arbitral Tribunal provided for in Section VI. They may be charged in the second place with payment of the amounts due in respect of claims by the nationals of such Allied or Associated Power with regard to their property, rights, and interests in the territory of other enemy Powers, in so far as those claims are otherwise unsatisfied.

The United States not having adopted the provisions of Section III and the Annex thereto the question is whether or not these provisions affect a suit under Section 9 of the Trading with the Enemy Act. It will be noted that Subdivision (2) of Subsection (h) of Article 297 provides that the proceeds of the property, rights, and interests, and the cash assets of German nationals received by an Allied or Associated Power, shall be subject to disposal by such Power in accordance with its laws and regulations, and *may* be applied in payment of the claims and debts defined by Article 297 and paragraph 4 of the Annex thereto.

In the first place, it is to be noted that these words are permissive. For the United States to take advantage of such provisions it would be necessary for it to pass legislation. The plain-

tiffs contend that the words in this subdivision provide that property of German nationals may be applied in payment of claims and debts as defined in paragraph 4 of the Annex to Article 297, and include a claim such as theirs under Section 9 of the Trading with the Enemy Act.

Reference to paragraph 4 of the Annex will show that provision is there made that all property, rights, and interests of German nationals within the territory of any Allied or Associated Power and the net proceeds of their sale, liquidation, or other dealings therewith *may* be charged by that Allied or Associated Power, in the first place, with the payment of amounts due in respect of claims by the nationals of that Allied or Associated Power with regard to their property, rights, and interests, or debts owing to them by German nationals, and the payment of claims growing out of acts committed by the German Government or by any German authorities since July 31, 1914. Here again permission is given to make use of enemy property in the manner specified.

The paragraph continues, however, to state that the amount of such claims—that is to say, claims of the nationals of the Allied or Associated Power—may be assessed by an arbitrator appointed by Mr. Gustave Ador, if he is willing, or if no such appointment is made by him, by an

arbitrator appointed by the Mixed Arbitral Tribunal provided for in Section VI.

It is contemplated by this provision that where the property of Germans is applied to the payment of debts of the nationals of an Allied or Associated Power, those debts must be assessed either by an arbitrator appointed by Mr. Gustave Ador, or by him, or by an arbitrator appointed by the Mixed Arbitral Tribunal provided for in Section VI of the Treaty of Versailles. This clearly has no reference to suits under Section 9 of the Trading with the Enemy Act in a Court of the United States.

Going back to Subdivision (2) of Subsection (h) of Article 297 it will be noted that it is further provided that any property, rights, and interests or proceeds thereof, or cash assets not used as above provided, may be retained by the said Allied or Associated Power, and if retained the cash value thereof shall be dealt with as provided in Article 243. Reference to Article 243 will still more clearly indicate that these provisions of the Treaty have no application to a suit under Section 9 of the Trading with the Enemy Act. Article 243 is as follows:

The following shall be reckoned as credits to Germany in respect of her reparation obligations:

(a) Any final balance in favor of Germany under Section V (Alsace-Lorraine) of Part III (Political Clauses for Europe)

and Sections III and IV of Part X (Economic Clauses) of the present treaty.

(b) Amounts due to Germany in respect of transfers under Section IV (Saar Basin) of Part III (Political Clauses for Europe), Part IX (Financial Clauses), and Part XII (Ports, Waterways, and Railways).

(c) Amounts which, in the judgment of the Reparation Commission, should be credited to Germany on account of other transfers under the present Treaty of property, rights, concessions, or other interests.

In no case, however, shall credit be given for property restored in accordance with Article 238 of the present Part.

No one will contend that any provision has been made by the United States for the final disposition of enemy property. It is, therefore, respectfully submitted that none of the provisions of the Treaty of Versailles, incorporated in the Treaty between the United States and Germany, has any bearing upon the present case.

#### CONCLUSION

The decree of the District Court, in so far as it permitted plaintiffs to recover the amount of their debt in marks in United States money at the rate of exchange prevailing at the date the debt was due, should be reversed and the portion of the decree of the lower Court refusing to allow the plaintiffs to recover interest upon their debt dur-

ing the period between April 6, 1917, and July 14, 1919, should be affirmed.

Respectfully submitted.

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*Property Custodian, and Frank White, as*  
*Treasurer of the United States.*

SEPTEMBER, 1925.

## APPENDIX

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### PORTIONS OF TREATY OF VERSAILLES INCORPORATED IN TREATY BETWEEN THE UNITED STATES AND GER- MANY AND RELEVANT TO THIS CASE

#### PART VIII

##### SECTION I

##### ARTICLE 243

The following shall be reckoned as credits to Germany in respect of her reparation obligations:

(a) Any final balance in favour of Germany under Section V (Alsace-Lorraine) of Part III (Political Clauses for Europe) and Sections III and IV of Part X (Economic Clauses) of the present Treaty;

(b) Amounts due to Germany in respect of transfers under Section IV (Saar Basin) of Part III (Political Clauses for Europe). Part IX (Financial Clauses), and Part XII (Ports, Waterways, and Railways);

(c) Amounts which in the judgment of the Reparation Commission should be credited to Germany on account of any other transfers under the present Treaty of property, rights, concessions, or other interests.

In no case, however, shall credit be given for property restored in accordance with Article 238 of the present Part.

\* \* \* \* \*



## PART X

\* \* \* \* \*

## SECTION III

## DEBTS

## ARTICLE 296

There shall be settled through the intervention of clearing offices to be established by each of the High Contracting Parties within three months of the notification referred to in paragraph (e) hereafter the following classes of pecuniary obligations:

(1) Debts payable before the war and due by a national of one of the Contracting Powers, residing within its territory, to a national of an Opposing Power, residing within its territory;

(2) Debts which became payable during the war to nationals of one Contracting Power residing within its territory and arose out of transactions or contracts with the nationals of an Opposing Power, resident within its territory, of which the total or partial execution was suspended on account of the declaration of war;

(3) Interest which has accrued due before and during the war to a national of one of the Contracting Powers in respect of securities issued by an Opposing Power, provided that the payment of interest on such securities to the nationals of that Power or to neutrals has not been suspended during the war;

(4) Capital sums which have become payable before and during the war to nationals of one of the Contracting Powers in respect of securities

issued by one of the Opposing Powers provided that the payment of such capital sums to nationals of that Power or to neutrals has not been suspended during the war.

The proceeds of liquidation of enemy property, rights, and interests mentioned in Section IV and in the Annex thereto will be accounted for through the Clearing Offices, in the currency and at the rate of exchange hereinafter provided in paragraph (*d*), and disposed of by them under the conditions provided by the said Section and Annex.

The settlements provided for in this Article shall be effected according to the following principles and in accordance with the Annex to this Section:

(*a*) Each of the High Contracting Parties shall prohibit, as from the coming into force of the present Treaty, both the payment and the acceptance of payment of such debts, and also all communications between the interested parties with regard to the settlement of the said debts otherwise than through the Clearing Offices;

(*b*) Each of the High Contracting Parties shall be respectively responsible for the payment of such debts due by its nationals, except in the cases where before the war the debtor was in a state of bankruptcy or failure, or had given formal indication of insolvency, or where the debt was due by a company whose business has been liquidated under emergency legislation during the war. Nevertheless, debts due by the inhabitants of territory invaded or occupied by the enemy before the Armistice will not be guaranteed by the States of which those territories form part;

(c) The sums due to the nationals of one of the High Contracting Parties by the nationals of an Opposing State will be debited to the Clearing Office of the country of the debtor, and paid to the creditor by the Clearing Office of the country of the creditor;

(d) Debts shall be paid or credited in the currency of such one of the Allied and Associated Powers, their colonies or protectorates, or the British Dominions, or India, as may be concerned. If the debts are payable in some other currency they shall be paid or credited in the currency of the country concerned, whether an Allied or Associated Power, Colony, Protectorate, British Dominion, or India, at the pre-war rate of exchange.

For the purpose of this provision the pre-war rate of exchange shall be defined as the average cable-transfer rate prevailing in the Allied or Associated country concerned during the month immediately preceding the outbreak of war between the said country concerned and Germany.

If a contract provides for a fixed rate of exchange governing the conversion of the currency in which the debt is stated into the currency of the Allied or Associated country concerned, then the above provisions concerning the rate of exchange shall not apply.

In the case of new States the currency in which and the rate of exchange at which debts shall be paid or credited shall be determined by the Reparation Commission provided for in Part VIII (Reparation);

(e) The provisions of this Article and of the Annex hereto shall not apply as between Germany on the one hand and any one of the Allied and

Associated Powers, their colonies or protectorates, or any one of the British Dominions or India, on the other hand, unless within a period of one month from the deposit of the ratification of the present Treaty by the Power in question, or of the ratification on behalf of such Dominion or of India, notice to that effect is given to Germany by the Government of such Allied or Associated Power or of such Dominion or of India, as the case may be ;

(f) The Allied and Associated Powers who have adopted this Article and the Annex hereto may agree between themselves to apply them to their respective nationals established in their territory so far as regards matters between their nationals and German nationals. In this case the payments made by application of this provision will be subject to arrangements between the Allied and Associated Clearing Offices concerned.

### ANNEX

1. Each of the High Contracting Parties will, within three months from the notification provided for in Article 296, paragraph (e), establish a Clearing Office for the collection and payment of enemy debts.

Local Clearing Offices may be established for any particular portion of the territories of the High Contracting Parties. Such local Clearing Offices may perform all the functions of a central Clearing Office in their respective districts, except that all transactions with the Clearing Office in the Opposing State must be effected through the central Clearing Office.

2. In this Annex the pecuniary obligations referred to in the first paragraph of Article 296 are described "as enemy debts," the persons from whom the same are due as "enemy debtors," the persons to whom they are due as "enemy creditors," the Clearing Office in the country of the creditor is called the "Creditor Clearing Office," and the Clearing Office in the country of the debtor is called the "Debtor Clearing Office."

3. The High Contracting Parties will subject contraventions if paragraph (a) of Article 296 to the same penalties as are at present provided by their legislation for trading with the enemy. They will similarly prohibit within their territory all legal process relating to payment of enemy debts, except in accordance with the provisions of this Annex.

4. The Government guarantee specified in paragraph (b) of Article 296 shall take effect whenever, for any reason, a debt shall not be recoverable, except in a case where at the date of the outbreak of war the debt was barred by the laws of prescription in force in the country of the debtor, or where the debtor was at that time in a state of bankruptcy or failure or had given formal indication of insolvency, or where the debt was due by a company whose business has been liquidated under emergency legislation during the war. In such case the procedure specified by this Annex shall apply to payment of the dividends.

The terms "bankruptcy" and "failure" refer to the application of legislation providing for such juridical conditions. The expression "formal indication of insolvency" bears the same meaning as it has in English law.

5. Creditors shall give notice to the Creditor Clearing Office within six months of its establishment of debts due to them, and shall furnish the Clearing Office with any documents and information required of them.

The High Contracting Parties will take all suitable measures to trace and punish collusion between enemy creditors and debtors. The Clearing Offices will communicate to one another any evidence and information which might help the discovery and punishment of such collusion.

The High Contracting Parties will facilitate as much as possible postal and telegraphic communication at the expense of the parties concerned and through the intervention of the Clearing Offices between debtors and creditors desirous of coming to an agreement as to the amount of their debt.

The Creditor Clearing Office will notify the Debtor Clearing Office of all debts declared to it. The Debtor Clearing Office will in due course inform the Creditor Clearing Office which debts are admitted and which debts are contested. In the latter case the Debtor Clearing Office will give the grounds for the nonadmission of debt.

6. When a debt has been admitted, in whole or in part, the Debtor Clearing Office will at once credit the Creditor Clearing Office with the amount admitted, and at the same time notify it of such credit.

7. The debt shall be deemed to be admitted in full and shall be credited forthwith to the Creditor Clearing Office unless within three months from the receipt of the notification or such longer time as may be agreed to by the Creditor Clearing

Office notice has been given by the Debtor Clearing Office that it is not admitted.

8. When the whole or part of a debt is not admitted the two Clearing Offices will examine into the matter jointly and will endeavour to bring the parties to an agreement.

9. The Creditor Clearing Office will pay to the individual creditor the sums credited to it out of the funds placed at its disposal by the Government of its country and in accordance with the conditions fixed by the said Government, retaining any sums considered necessary to cover risks, expenses, or commissions.

10. Any person having claimed payment of an enemy debt which is not admitted in whole or in part shall pay to the Clearing Office, by way of fine, interest at 5 per cent on the part not admitted. Any person having unduly refused to admit the whole or part of a debt claimed from him shall pay, by way of fine, interest at 5 per cent on the amount with regard to which his refusal shall be disallowed.

Such interest shall run from the date of expiration of the period provided for in paragraph 7 until the date on which the claim shall have been disallowed or the debt paid.

Each Clearing Office shall, in so far as it is concerned, take steps to collect the fines above provided for, and will be responsible if such fines can not be collected.

The fines will be credited to the other Clearing Office, which shall retain them as a contribution towards the cost of carrying out the present provisions.

11. The balance between the Clearing Offices shall be struck monthly and the credit balance paid in cash by the debtor State within a week.

Nevertheless, any credit balances which may be due by one or more of the Allied and Associated Powers shall be retained until complete payment shall have been effected of the sums due to the Allied or Associated Powers or their nationals on account of the war.

12. To facilitate discussion between the Clearing Offices each of them shall have a representative at the place where the other is established.

13. Except for special reasons all discussions in regard to claims will, so far as possible, take place at the Debtor Clearing Office.

14. In conformity with Article 296, paragraph (b), the High Contracting Parties are responsible for the payment of the enemy debts owing by their nationals.

The Debtor Clearing Office will therefore credit the Creditor Clearing Office with all debts admitted, even in case of inability to collect them from the individual debtor. The Governments concerned will, nevertheless, invest their respective Clearing Offices with all necessary powers for the recovery of debts which have been admitted.

As an exception, the admitted debts owing by persons having suffered injury from acts of war shall only be credited to the Creditor Clearing Office when the compensation due to the person concerned in respect of such injury shall have been paid.

15. Each Government will defray the expenses of the Clearing Office set up in its territory, including the salaries of the staff.



16. Where the two Clearing Offices are unable to agree whether a debt claimed is due, or in case of a difference between an enemy debtor and an enemy creditor or between the Clearing Offices, the dispute shall either be referred to arbitration, if the parties so agree under conditions fixed by agreement between them, or referred to the Mixed Arbitral Tribunal provided for in Section VI hereafter.

At the request of the Creditor Clearing Office the dispute may, however, be submitted to the jurisdiction of the Courts of the place of domicile of the debtor.

17. Recovery of sums found by the Mixed Arbitral Tribunal, the Court, or the Arbitration Tribunal to be due shall be effected through the Clearing Offices as if these sums were debts admitted by the Debtor Clearing Office.

18. Each of the Governments concerned shall appoint an agent who will be responsible for the presentation to the Mixed Arbitral Tribunal of the cases conducted on behalf of its Clearing Office. This agent will exercise a general control over the representatives or counsel employed by its nationals.

Decisions will be arrived at on documentary evidence, but it will be open to the Tribunal to hear the parties in person, or according to their preference by their representatives approved by the two Governments, or by the agent referred to above, who shall be competent to intervene along with the party or to reopen and maintain a claim abandoned by the same.

19. The Clearing Offices concerned will lay before the Mixed Arbitral Tribunal all the informa-

tion and documents in their possession, so as to enable the Tribunal to decide rapidly on the cases which are brought before it.

20. Where one of the parties concerned appeals against the joint decision of the two Clearing Offices he shall make a deposit against the costs, which deposit shall only be refunded when the first judgment is modified in favour of the appellant and in proportion to the success he may attain, his opponent in case of such a refund being required to pay an equivalent proportion of the costs and expenses. **Security accepted by the Tribunal may be substituted for a deposit.**

A fee of 5 per cent of the amount in dispute shall be charged in respect of all cases brought before the Tribunal. This fee shall, unless the Tribunal directs otherwise, be borne by the unsuccessful party. Such fee shall be added to the deposit referred to. It is also independent of the security.

The Tribunal may award to one of the parties a sum in respect of the expenses of the proceedings.

Any sum payable under this paragraph shall be credited to the Clearing Office of the successful party as a separate item.

21. With a view to the rapid settlement of claims, due regard shall be paid in the appointment of all persons connected with the Clearing Offices or with the Mixed Arbitral Tribunal to their knowledge of the language of the other country concerned.

Each of the Clearing Offices will be at liberty to correspond with the other and to forward documents in its own language.

22. Subject to any special agreement to the contrary between the Governments concerned, debts shall carry interest in accordance with the following provisions:

Interest shall not be payable on sums of money due by way of dividend, interest, or other periodical payments which themselves represent interest on capital.

The rate of interest shall be 5 per cent per annum, except in cases where by contract, law, or custom the creditor is entitled to payment of interest at a different rate. In such cases the rate to which he is entitled shall prevail.

Interest shall run from the date of commencement of hostilities (or, if the sum of money to be recovered fell due during the war, from the date at which it fell due) until the sum is credited to the Clearing Office of the creditor.

Sums due by way of interest shall be treated as debts admitted by the Clearing Offices and shall be credited to the Creditor Clearing Office in the same way as such debts.

23. Where by decision of the Clearing Offices or the Mixed Arbitral Tribunal a claim is held not to fall within Article 296, the creditor shall be at liberty to prosecute the claim before the Courts or to take such other proceedings as may be open to him.

The presentation of a claim to the Clearing Office suspends the operation of any period of prescription.

24. The High Contracting Parties agree to regard the decisions of the Mixed Arbitral Tribunal as final and conclusive and to render them binding upon their nationals.

25. In any case where a Creditor Clearing Office declines to notify a claim to the Debtor Clearing Office, or to take any step provided for in this Annex, intended to make effective in whole or in part a request of which it has received due notice, the enemy creditor shall be entitled to receive from the Clearing Office a certificate setting out the amount of the claim and shall then be entitled to prosecute the claim before the courts or to take such other proceedings as may be open to him.

#### SECTION IV

### PROPERTY, RIGHTS, AND INTERESTS

#### ARTICLE 297

The question of private property, rights, and interests in an enemy country shall be settled according to the principles laid down in this Section and to the provisions of the Annex hereto.

(a) The exceptional war measures and measures of transfer (defined in paragraph 3 of the Annex hereto) taken by Germany with respect to the property, rights, and interests of nationals of Allied or Associated Powers, including companies and associations in which they are interested, when liquidation has not been completed, shall be immediately discontinued or stayed and the property, rights, and interests concerned restored to their owners, who shall enjoy full rights therein in accordance with the provisions of Article 298.

(b) Subject to any contrary stipulations which may be provided for in the present Treaty, the Allied and Associated Powers reserve the right to retain and liquidate all property, rights, and

interests belonging at the date of the coming into force of the present Treaty to German nationals, or companies controlled by them, within their territories, colonies, possessions, and protectorates, including territories ceded to them by the present Treaty.

The liquidation shall be carried out in accordance with the laws of the Allied or Associated State concerned, and the German owner shall not be able to dispose of such property, rights, or interests nor to subject them to any charge without the consent of that State.

German nationals who acquire *ipso facto* the nationality of an Allied or Associated Power in accordance with the provisions of the present Treaty will not be considered as German nationals within the meaning of this paragraph.

(c) The price or the amount of compensation in respect of the exercise of the right referred to in the preceding paragraph (b) will be fixed in accordance with the methods of sale or valuation adopted by the laws of the country in which the property has been retained or liquidated.

(d) As between the Allied and Associated Powers or their nationals on the one hand and Germany or her nationals on the other hand, all the exceptional war measures, or measures of transfer, or acts done or to be done in execution of such measures as defined in paragraphs 1 and 3 of the Annex hereto shall be considered as final and binding upon all persons except as regards the reservations laid down in the present Treaty.

(e) The nationals of Allied and Associated Powers shall be entitled to compensation in respect of damage or injury inflicted upon their

property, rights, or interests, including any company or association in which they are interested, in German territory as it existed on August 1, 1914, by the application either of the exceptional war measures or measures of transfer mentioned in paragraphs 1 and 3 of the Annex hereto. The claims made in this respect by such nationals shall be investigated, and the total of the compensation shall be determined by the Mixed Arbitral Tribunal provided for in Section VI or by an Arbitrator appointed by that Tribunal. This compensation shall be borne by Germany and may be charged upon the property of German nationals within the territory or under the control of the claimant's State. This property may be constituted as a pledge for enemy liabilities under the conditions fixed by paragraph 4 of the Annex hereto. The payment of this compensation may be made by the Allied or Associated State, and the amount will be debited to Germany.

(f) Whenever a national of an Allied or Associated Power is entitled to property which has been subjected to a measure of transfer in German territory and expresses a desire for its restitution, his claim for compensation in accordance with paragraph (e) shall be satisfied by the restitution of the said property if it still exists in specie.

In such case Germany shall take all necessary steps to restore the evicted owner to the possession of his property, free from all encumbrances or burdens with which it may have been charged after the liquidation, and to indemnify all third parties injured by the restitution.

If the restitution provided for in this paragraph can not be effected, private agreements arranged by the intermediation of the Powers concerned or the Clearing Offices provided for in the Annex to Section III may be made, in order to secure that the national of the Allied or Associated Power may secure compensation for the injury referred to in paragraph (e) by the grant of advantages or equivalents which he agrees to accept in place of the property, rights, or interests of which he was deprived.

Through restitution in accordance with this Article the price or the amount of compensation fixed by the application of paragraph (e) will be reduced by the actual value of the property restored, account being taken of compensation in respect of loss of use or deterioration.

(g) The rights conferred by paragraph (f) are reserved to owners who are nationals of Allied or Associated Powers within whose territory legislative measures prescribing the general liquidation of enemy property, rights, or interests were not applied before the signature of the Armistice.

(h) Except in cases where, by application of paragraph (f), restitutions in specie have been made, the net proceeds of sales of enemy property, rights, or interests, wherever situated, carried out either by virtue of war legislation or by application of this Article, and in general all cash assets of enemies, shall be dealt with as follows:

(1) As regards Powers adopting Section III and the Annex thereto, the said proceeds and cash assets shall be credited to the Power of which the owner is a national, through the Clearing Office established thereunder; any credit balance in

favor of Germany resulting therefrom shall be dealt with as provided in Article 243.

(2) As regards Powers not adopting Section III and the Annex thereto, the proceeds of the property, rights, and interests and the cash assets of the nationals of Allied or Associated Powers held by Germany shall be paid immediately to the person entitled thereto or to his Government; the proceeds of the property, rights, and interests and the cash assets of German nationals received by an Allied or Associated Power shall be subject to disposal by such Power in accordance with its laws and regulations and may be applied in payment of the claims and debts defined by this Article or paragraph 4 of the Annex hereto. Any property, rights, and interests, or proceeds thereof or cash assets not used as above provided may be retained by the said Allied or Associated Power, and if retained the cash value thereof shall be dealt with as provided in Article 243.

In the case of liquidations effected in new States which are signatories of the present Treaty as Allied and Associated Powers, or in States which are not entitled to share in the reparation payments to be made by Germany, the proceeds of liquidations effected by such States shall, subject to the rights of the Reparation Commission under the Present Treaty, particularly under Articles 235 and 260, be paid direct to the owner. If on the application of that owner the Mixed Arbitral Tribunal provided for by Section VI of this Part, or an arbitrator appointed by that Tribunal, is satisfied that the conditions of the sale or measures taken by the Government of the State in question outside its general legislation were unfairly preju-



dicial to the price obtained, they shall have discretion to award to the owner equitable compensation to be paid by that State.

(i) Germany undertakes to compensate her nationals in respect of the sale or retention of their property, rights, or interests in Allied or Associated States.

(j) The amount of all taxes and imposts upon capital levied or to be levied by Germany on the property, rights, and interests of the nationals of the Allied or Associated Powers from November 11, 1918, until three months from the coming into force of the present Treaty, or, in the case of property, rights, or interests which have been subjected to exceptional measures of war, until restitution in accordance with the present Treaty shall be restored to the owners.

#### ARTICLE 298

Germany undertakes, with regard to the property, rights, and interests, including companies and associations in which they were interested, restored to nationals of Allied and Associated Powers in accordance with the provisions of Article 297, paragraph (a) or (f):

(a) to restore and maintain, except as expressly provided in the present Treaty, the property, rights, and interests of the nationals of Allied or Associated Powers in the legal position obtaining in respect of the property, rights, and interests of German nationals under the laws in force before the war;

(b) not to subject the property, rights, or interests of the nationals of the Allied or Associated Powers to any measures in derogation of

property rights which are not applied equally to the property, rights, and interests of German nationals, and to pay adequate compensation in the event of the application of these measures.

## ANNEX

1. In accordance with the provisions of Article 297, paragraph (*d*), the validity of vesting orders and of orders for the winding up of businesses or companies, and of any other orders, directions, decisions, or instructions of any court or any department of the Government of any of the High Contracting Parties made or given, or purporting to be made or given, in pursuance of war legislation with regard to enemy property, rights, and interests is confirmed. The interests of all persons shall be regarded as having been effectively dealt with by any order, direction, decision, or instruction dealing with property in which they may be interested, whether or not such interests are specifically mentioned in the order, direction, decision, or instruction. No question shall be raised as to the regularity of a transfer of any property, rights, or interests dealt with in pursuance of any such order, direction, decision, or instruction. Every action taken with regard to any property, business, or company, whether as regards its investigation, sequestration, compulsory administration, use, requisition, supervision, or winding up, the sale or management of property, rights, or interests, the collection or discharge of debts, the payment of costs, charges, or expenses, or any other matter whatsoever, in pursuance of orders, directions, decisions, or instructions of any court or of any department of the

Government of any of the High Contracting Parties, made or given, or purporting to be made or given, in pursuance of war legislation with regard to enemy property, rights, or interests, is confirmed. Provided that the provisions of this paragraph shall not be held to prejudice the titles to property heretofore acquired in good faith and for value and in accordance with the laws of the country in which the property is situated by nationals of the Allied and Associated Powers.

The provisions of this paragraph do not apply to such of the above-mentioned measures as have been taken by the German authorities in invaded or occupied territory, nor to such of the above-mentioned measures as have been taken by Germany or the German authorities since November 11, 1918, all of which shall be void.

2. No claim or action shall be made or brought against any Allied or Associated Power or against any person acting on behalf of or under the direction of any legal authority or Department of the Government of such a Power by Germany or by any German national wherever resident in respect of any act or omission with regard to his property, rights, or interests during the war or in preparation for the war. Similarly no claim or action shall be made or brought against any person in respect of any act or omission under or in accordance with the exceptional war measures, laws, or regulations of any Allied or Associated Power.

In Article 297 and this Annex the expression "exceptional war measures" includes measures of all kinds, legislative, administrative, judicial, or others, that have been taken or will be taken

hereafter with regard to enemy property and which have had or will have the effect of removing from the proprietors the power of disposition over their property, though without affecting the ownership, such as measures of supervision, of compulsory administration, and of sequestration; or measures which have had or will have as an object the seizure of, the use of, or the interference with enemy assets, for whatsoever motive, under whatsoever form or in whatsoever place. Acts in the execution of these measures include all detentions, instructions, orders, or decrees of Government departments or courts applying these measures to enemy property, as well as acts performed by any person connected with the administration or the supervision of enemy property, such as the payment of debts, the collecting of credits, the payment of any costs, charges, or expenses, or the collecting of fees.

Measures of transfer are those which have affected or will affect the ownership of enemy property by transferring it in whole or in part to a person other than the enemy owner, and without his consent, such as measures directing the sale, liquidation, or devolution of ownership in enemy property, or the cancelling of titles or securities.

4. All property, rights, and interests of German nationals within the territory of any Allied or Associated Power and the net proceeds of their sale, liquidation, or other dealing therewith may be charged by that Allied or Associated Power in the first place with payment of amounts due in respect of claims by the nationals of that Allied or Associated Power with regard to their property, rights, and interests, including companies and associa-

by its nationals and relating to property, rights, or interests situated in the territory of that Allied or Associated Power, including any shares, stock, debentures, debenture stock, or other obligations of any company incorporated in accordance with the laws of that Power.

Germany will at any time on demand of any Allied or Associated Power furnish such information as may be required with regard to the property, rights, and interests of German nationals within the territory of such Allied or Associated Power, or with regard to any transactions concerning such property, rights, or interests effected since July 1, 1914.

11. The expression "cash assets" includes all deposits or funds established before or after the declaration of war, as well as all assets coming from deposits, revenues, or profits collected by administrators, sequestrators, or others from funds placed on deposit or otherwise, but does not include sums belonging to the Allied or Associated Powers or to their component States, Provinces, or Municipalities.

12. All investments wheresoever effected with the cash assets of nationals of the High Contracting Parties, including companies and associations in which such nationals were interested, by persons responsible for the administration of enemy properties or having control over such administration, or by order of such persons or of any authority whatsoever shall be annulled. These cash assets shall be accounted for irrespective of any such investment.

Within one month from the coming into force of the present Treaty, or on demand at any time,

Germany will deliver to the Allied and Associated Powers all accounts, vouchers, records, documents, and information of any kind which may be within German territory and which concern the property, rights, and interests of the nationals of those Powers, including companies and associations in which they are interested, that have been subjected to an exceptional war measure or to a measure of transfer either in German territory or in territory occupied by Germany or her allies.

The controllers, supervisors, managers, administrators, sequestrators, liquidators, and receivers shall be personally responsible under guarantee of the German Government for the immediate delivery in full of these accounts and documents and for their accuracy.

14. The provisions of Article 297 and this Annex relating to property, rights, and interests in an enemy country, and the proceeds of the liquidation thereof, apply to debts, credits, and accounts, Section III regulating only the method of payment.

In the settlement of matters provided for in Article 297 between Germany and the Allied or Associated States, their colonies or protectorates, or any one of the British Dominions or India, in respect of any of which a declaration shall not have been made that they adopt Section III, and between their respective nationals, the provisions of Section III respecting the currency in which payment is to be made and the rate of exchange and of interest shall apply unless the Government of the Allied or Associated Power concerned shall within six months of the coming into force

of the present Treaty notify Germany that the said provisions are not to be applied.

15. The provisions of Article 297 and this Annex apply to industrial, literary, and artistic property which has been or will be dealt with in the liquidation of property, rights, interests, companies, or businesses under war legislation by the Allied or Associated Powers, or in accordance with the stipulations of Article 297, paragraph (b).



IN THE

# Supreme Court of the United States,

OCTOBER TERM, 1925.

---

FREDERICK C. HICKS, AS ALIEN PROPERTY CUSTODIAN, AND FRANK WHITE,  
AS TREASURER OF THE UNITED STATES,

*Petitioners,*

v.

BENJAMIN GUINNESS, WALTER T. ROSEN, MORITZ ROSENTHAL,  
*et al., etc.*

---

BENJAMIN GUINNESS, WALTER T. ROSEN, MORITZ ROSENTHAL,  
*et al., etc.,*

*Petitioners,*

v.

FREDERICK C. HICKS, AS ALIEN PROPERTY CUSTODIAN, FRANK WHITE, AS  
TREASURER OF THE UNITED STATES, AND CARL JOYGER, *et al., etc.*

---

ON WRITS OF HABEAS CORPUS TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT.

---

BRIEF ON BEHALF OF BENJAMIN GUINNESS, WALTER T.  
ROSEN, MORITZ ROSENTHAL, *et al.*, CONSTITUTING  
THE FIRM OF LADENBURG, THALMANN & CO.

*Alexander B. Siegel*

The Evening Post Job Printing Office, Inc., 106 Fulton St., New York, N. Y.

p 16





## SUBJECT INDEX.

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	PAGE	
Report of opinions below .....	1	
The jurisdiction of this Court .....	2	
Statement of the case .....	3	
Assignment of errors .....	5	
Argument .....	6	
POINT I: In an action brought for a recovery of a debt under the Trading with the Enemy Act, out of property of the alien enemy seized by the Alien Property Custodian, and which has borne interest prior to April 6, 1917, interest is allow- able for the whole period subsequent to April 6, 1917 .....		8
(A) Apart from Treaty provisions....	8	
(B) Under the Treaty provisions.....	26	
POINT II: There is no error in the decree below on the question of the rate of ex- change .....		41
(A) General discussion .....	41	
(B) The Trading with the Enemy Act.	45	
(C) The Authorities at Common Law..	48	
United States Courts .....	48	
New York State .....	49	
Courts of Last Resort of other states .....	50	
English cases .....	51	
(D) The effect of the Treaty provisions.	60	
Conclusion .....	61	
APPENDIX: Treaty of Versailles Sections III and IV of Part X .....		62

## II

### TABLE OF CASES CITED.

	PAGE
Bartram v. Robertson, 15 Fed. 212.....	37
Bean v. Chapman, 62 Ala. 58.....	25
Birge-Forbes Co. v. Heye, 251 U. S. 317....	48
Birge-Forbes Co. v. Heye, 248 Fed. 636....	48
Blythe v. Hinckley, 173 U. S. 501, 508.....	37
British-American Continental Bank, Lim., <i>in re</i> : Credit-Generale Liegeois claim (1922), 2 Ch. 589 .....	55
British-American Continental Bank, Ltd., <i>in re</i> Goldzicher and Penso's Claim (1922), 2 Ch. 575.....	54
Brower v. Hastic & Co., 3 Call 22.....	22
Brown v. Hiatts, 15 Wall. 177.....	16, 23
Chae Chan Ping v. U. S., 130 U. S. 581.....	36
Conn v. Penn, Peters Circuit Court 496....	20, 22
Dante v. Miniggio, 298 Fed. 845.....	49
Dean v. Christy, 4 H. & N. (Md.) 161.....	25
Dunlop & Wilson v. Alexander's Admin., 1 Cranch C. C. 498.....	41
Foxcraft v. Nagle, 2 Dall. 132.....	20
Fred v. Dixon, 27 Gratt. 441.....	22
Gross v. Mendel, 171 App. Div. 237, <i>affd.</i> 225 N. Y. 633.....	50
Guaranty Trust Co. v. Meer, 114 Misc. 327..	50
Guinness v. Miller, 299 Fed. 538.....	1
Guinness v. Miller 291 Fed. 768, 769.....	2
Hamilton v. Eaton, 1 Hughes 249.....	41
Hauenstein v. Lynham, 100 U. S. 483.....	37
Higginson v. Mein, 4 Cranch 415.....	41
Hoare v. Allen, 2 Dall. 102.....	20
Hopkirk v. Bell, 3 Cranch, 454, 4 Cranch, 164 .....	41

### III

	PAGE
Hoppe <i>v.</i> Russo-Asiatic Bank, 235 N. Y. 37..	49
Hugh Stevenson & Sons, Limited, <i>v.</i> Aktiengesellschaft für Cartonnagen-Industrie [1917], 1 K. B. 842.....	18
Hugh Stevenson & Sons <i>v.</i> Aktiengesellschaft für Cartonnagen-Industrie [1918], A. C. 239.....	19
Hylton's Lessee <i>v.</i> Brown, 1 Wash. C. C. 298, 343 .....	41
<i>In re</i> Ah Lung, 18 Fed. 28.....	37
<i>In re</i> Parrott, 1 Fed. 481.....	36
Jones <i>v.</i> Walker (opinion by Jay, <i>C. J.</i> , not dated), 2 Paine, 688.....	41
Katcher <i>v.</i> American Express Company, 94 N. J. L. 165.....	51
Lash <i>v.</i> Lambert, 15 Minn. 416.....	22
Lebeaupin <i>v.</i> Crispin (1920), 2 K. B. 714..	47
Mayer <i>v.</i> Reed & Co., 37 Georgia 482.....	22
McGaughy, Parker & Co. <i>v.</i> Leon Berg & Co., 4 Heisk, 695.....	22
McNair <i>v.</i> Ragland, <i>et al.</i> , 16 N. C. 516, 526.	41
McVeigh <i>v.</i> Bank of the Old Dominion, 26 Gratt. 188 .....	22
McVeigh <i>v.</i> United States, 11 Wallace, 259.	16
Miller <i>v.</i> Robertson, 266 U. S. 243.....	10-15, 16
Neilson <i>v.</i> Rutledge, 1 Dessauss, Eq. 194..	20, 21, 22
Ogden <i>v.</i> Blackledge, 2 Cranch, 272.....	41
Page <i>v.</i> Pendelton, 1 Wythe's Repts. (Va.), 211, 217 .....	41
Page <i>v.</i> Levenson, 281 Fed. 555.....	49
Pavenstedt <i>v.</i> N. Y. Life Ins. Co., 203 N. Y. 91.....	50

# IV

	PAGE
Peyrae v. Wilkinson and another, 156 <i>Law Times</i> , 341 (November 10, 1923).....	59
Pillow v. Brown & Childress, 26 Ark. 240..	22
Robinson & Co. v. Continental Insurance Co. of Mannheim (1915), 1 K. B. 155..	17
Selden v. Preston, 11 Bush, 191.....	22
Shortridge v. Macon, 61 N. C. 392.....	21, 23
Simonoff v. Granite City National Bank, 279 Ill. 248.....	50
Sire v. Godfrey, 196 App. Div. 529.....	50
Spencer v. Brower, 32 Texas, 664.....	23
S. S. Celia v. S. S. Volturmo (1921), 2 A. C. 544 .....	51, 54
State of Georgia v. Brailsford, 3 Dall. 1....	41
Strohmeyer & Arpe Co. v. Guaranty Trust Co., 172 App. Div. 16.....	50
Uliendahl v. Pankhurst Wright & Co., K. B. Div. July 6, 1923, 39 Times L. R. 628..	58
Walker v. Beauchler, 27 Gratt. 511.....	22
Ward v. Smith, 7 Wall. 447.....	16
Ware v. Hylton, 3 Dall. (U. S.) 199.....	36, 37
Whitney v. Robertson, 124 U. S. 190.....	36
Wormser Bros. v. F. Marroquin & Co., 249 Fed. 428 .....	49
Yeaton v. Berney, 62 Ill. 61.....	23
Young v. Godby, 15 Wall. 562.....	13

## TABLE OF STATUTES.

	PAGE
Constitution of the United States, Article VI .....	36
Joint Resolution relating to Treaty of Peace with Germany (61 Congressional Record, 6438, First Session, 67th Congress) .....	28
Judicial Code, Section 240, 36 St. L. 1157..	2
Statute declaring peace with Germany (42 Stat. L. 105) .....	27
Trading with the Enemy Act (Act of June 5, 1920, Ch. 241, 41, Stat. L. 977) .....	8
Section 9(a) .....	8, 45
Section 9(e) .....	46
Trading with the Enemy Act (Act of October 6, 1917, Ch. 106, 40 Stat. L. 419) ..	3, 10, 18
Treaty of Peace between Germany and United States (Treaty Series No. 658) .	26
Article I .....	27
Article II .....	28
Treaty of Versailles (Senate Document No. 49, 1st Session, 66th Congress) .....	29
Part X	
Section III .....	29
Sub. Div. D, Art. 296.....	61
Sub. Div. 22 of the Annex.....	33
Section IV .....	29
Art. 297, Paragraph H,	
Sub. Div. 2.....	31
Sub. Div. 4 of the Annex.....	31
Sub. Div. 14 of the Annex....	32

# VI

## TABLE OF TEXT BOOKS.

	PAGE
Krandall, Treaties, their making and enforcement, 115, 116 .....	37
Lawyers Reports Annotated (Note), 1917-C, 672 .....	24
Malloy, treaties, international acts, protocols and agreements between the United States of America and other powers, 1776-1909, Vol. 1, page 586.....	37

**Nos. 80 and 81.**

# **Supreme Court of the United States**

**OCTOBER TERM, 1925**

---

FREDERICK C. HICKS (substituted for Thomas Woodnutt Miller), as Alien Property Custodian, and FRANK WHITE, as Treasurer of the United States, Petitioners,

**VS.**

BENJAMIN GUINNESS, WALTER T. ROSEN, MORITZ ROSENTHAL, *et al.*, ETC.

---

BENJAMIN GUINNESS, WALTER T. ROSEN, MORITZ ROSENTHAL, *et al.*, ETC., Petitioners,

**VS.**

FREDERICK C. HICKS (substituted for Thomas Woodnutt Miller), as Alien Property Custodian; FRANK WHITE, as Treasurer of the United States, and CARL JOERGER, *et al.*, ETC.

---

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT OF  
APPEALS FOR THE SECOND CIRCUIT.

---

BRIEF ON BEHALF OF BENJAMIN GUINNESS, WALTER T. ROSEN, MORITZ ROSENTHAL, ET AL., CONSTITUTING THE FIRM OF LADENBURG, THALMANN & CO., PETITIONERS AND RESPONDENTS.

## **Report of Opinions Below.**

The opinion of the Circuit Court of Appeals for the Second Circuit is reported under the title of *Guinness v. Miller*, 299 Fed. 538; the opinion of the



United States District Court for the Southern District of New York is reported under the title of *Guinness v. Miller*, 291 Fed. 768, 769.

### **The Jurisdiction of this Court.**

The judgment to be reviewed is a final judgment of the United States Circuit Court of Appeals, dated April 21, 1924, affirming the decree of the United States District Court for the Southern District of New York (R. 27).

The cause is in the Supreme Court by virtue of writs of certiorari granted on June 9, 1924, upon the petitions, respectively, of the plaintiffs below, and of Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States.\*

Since the granting of these writs of certiorari Thomas W. Miller ceased to be Alien Property Custodian, and by order of this Court, dated May 25, 1925, Frederick C. Hicks, as Alien Property Custodian, was substituted in his place as a party in these causes.

The statutory provisions under which the jurisdiction of the Supreme Court is invoked are found in Section 240 of the Judicial Code as it stood on June 8, 1924 (36 Stat. L. 1157).

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\* As each of the parties below applied for a writ of certiorari, and each are both petitioners and respondents, the plaintiffs in the District Court will for clarity be referred to in this brief as plaintiffs.

### **Statement of the Case.**

At the time of the commencement of the suit and for many years prior thereto, the plaintiffs and their predecessors, constituting the firm of Ladenburg, Thalmann & Co., were bankers in the Borough of Manhattan, City of New York (R. 8). For many years prior to April 6, 1917, the defendants constituting the firm of Delbrück, Schickler & Co., who made no appearance either in the United States District Court or in the Circuit Court of Appeals, were engaged in transactions with the firm of Ladenburg, Thalmann & Co., and on April 6, 1917 were indebted to the firm of Ladenburg, Thalmann & Co., in the sum of Marks 1,079.35, as of January 1, 1916, as shown by an account stated, dated December 31, 1916, duly acknowledged by the defendants Delbrück, Schickler & Co., and thereafter there were no dealings between the plaintiffs and the said defendants, Delbrück, Schickler & Co. (R. 9).

The plaintiffs duly filed a notice of claim against the defendants, Delbrück, Schickler & Co., with Alien Property Custodian as prescribed in the Trading with the Enemy Act (Act of October 6, 1917, ch. 106, 40 Stat. L. 419), claiming an indebtedness of Marks 1,079.35, as of January 1, 1916, converted into dollars at the pre-war rate of exchange, at the rate of 17½ cents per Mark, the said pre-war rate of exchange being the average rate of exchange prevailing for one month prior to April 6, 1917, the date of the commencement of the war between the United States and Germany (R. 8, 9), and conceded a separate indebtedness to the defendant, Delbrück, Schickler & Co., of \$35.35 (R. 9).

The value of the Mark on December 31, 1916 was  $18\frac{1}{4}$  cents (R. 9).

The defendants Alien Property Custodian and Treasurer of the United States have seized sufficient moneys of the defendants, Delbrück, Schickler & Co., to pay the claim of the plaintiffs (R. 9).

Valuing the Mark at the rate of exchange of  $17\frac{1}{2}$  cents per Mark, the claim of the plaintiffs against the defendants, Delbrück, Schickler & Co., as of April 6, 1917, after allowing an offset of \$43.95 was \$148.28 (R. 9).

The United States District Court for the Southern District of New York in its final decree dated July 17, 1923, allowed the claim in the sum of \$183.10 with interest from May 23, 1923 (R. 13), which resulted in an allowance of interest on the claim from July 14, 1919 (R. 9), thus excluding interest for the period from April 6, 1917, the date of the commencement of the war, to July 14, 1919, the date when commercial transactions with German subjects was permitted under license from the President (R. 10).

At the date of the trial, May 23, 1923, the value of the Mark was  $2/1000$  of a cent, and on July 17, 1925, the date of the decree, the value of the Mark was  $1/25000$  of a cent (R. 9, 10).

The judgment was entered for the payment of a sum based on the valuation of the Mark at  $17\frac{1}{2}$  cents per Mark (R. 10).

If interest had been allowed for the period between April 6, 1917 and July 14, 1919, the decree would have provided for the payment of \$203.60 in lieu of \$183.10 with interest from May 23, 1923 (R. 9).

If the value of a Mark were taken at  $1/2000$  of a cent, as at the date of trial, or  $1/25000$  of a cent,

as at the date of judgment, then, since the original debt was for 1,079.35 Marks, the complaint would have had to be dismissed, because on each of these dates the debt would have dwindled to a value of less than one cent.

### **Assignment of Errors.**

Only two questions arise in this case.

The first is raised by the assignment of errors submitted by the plaintiffs, to the effect that it was erroneous for the United States District Court to refuse the recovery of interest upon the claim in question from April 6, 1917 to July 14, 1919 (R. 15).

The second is raised by the assignment of errors of the defendants, Alien Property Custodian and Treasurer of the United States, to the effect that it was erroneous to give judgment for the plaintiffs based upon a value of the Mark as of the date when the account between the parties was stated, or as of any date other than the date of the judgment (R. 14), the acceptance of this position requiring a dismissal of the complaint (R. 14).

It may be noted here that the third assignment of errors of the defendants, Alien Property Custodian and Treasurer of the United States, referring to the statement of an account between the plaintiffs and the defendants, Delbrück, Schickler & Co., on *December 16, 1917*, finds no basis in the statement of evidence (R. 8-10), or in the pleadings (R. 1-4, R. 6-8), and is based solely on an inadvertent statement in the opinion of Judge Learned Hand (R. 11). Of course, there could have been no statement of the account on December 16, 1917, in the midst of the war.

### Argument.

The plaintiffs submit that in an action brought under Section 9 of the Trading with the Enemy Act to recover from the Alien Property Custodian and Treasurer of the United States, out of the property of an alien enemy seized by them under the provisions of the Trading with the Enemy Act, a debt owing to the plaintiffs by the alien enemy, the plaintiffs are entitled to recover not only the principal of the debt, but also interest thereon, from the date of the inception of the debt.

This proposition is not controverted by the Alien Property Custodian and by the Treasurer of the United States, except to the extent that they contend that such interest is not allowable during the period that commercial communication between the United States and Germany was interdicted, that is, between April 6, 1917, and July 14, 1919. Plaintiffs, on the other hand, contend that such an artificial hiatus does not exist, particularly where the debt was of a character which was drawing interest prior to April 6, 1917. This contention is sustained on two grounds: *First*, that whatever might be the rule in an action brought by them to recover a personal judgment against the alien enemy, such an exception as to the time when interest shall run cannot apply in an action brought against the Alien Property Custodian and Treasurer of the United States under the Trading with the Enemy Act merely to have property of the alien enemy seized by them applied to the payment of the debt; and *Secondly*, that by virtue of the Treaty of Peace between the United States and Germany,

such interest is expressly to be allowed in the character of action here instituted by the plaintiffs against the Alien Property Custodian and Treasurer of the United States.

Plaintiffs also contend, and in this contention they have been upheld by the District Court and the Circuit Court of Appeals, that they are entitled to recover the true value of the debt from the alien enemy to them as of the date of its inception, or as of the date of the beginning of the war. This contention they sustain also, *First*, by reason of the provisions of the Trading with the Enemy Act as interpreted in the light of the Common Law, and *Secondly*, because the Treaty of Peace between Germany and the United States expressly provides that in an action such as this the plaintiffs shall be entitled to recover the true value of the debt as of a date prior to the institution of hostilities.

The question of the allowance of interest will be considered first, because upon that question the plaintiffs have been unsuccessful below.

## POINT I.

**In an action brought for the recovery of a debt under the Trading with the Enemy Act, out of property of the alien enemy seized by the Alien Property Custodian, and which has borne interest prior to April 6, 1917, interest is allowable for the whole period subsequent to April 6, 1917.**

### (A)

#### **Apart from Treaty Provisions.**

This action is brought under Section 9 (a) of the Trading with the Enemy Act, as amended (Act of June 5, 1920, ch. 241, 41 Stat. L. 977), which reads as follows:

“Sec. 9 (a) That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien

Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may, at any time before the expiration of six months after the end of the war institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated."



This Section 9 (a) has since the institution of this suit been amended by Act of March 4, 1923, ch. 285, 42 Stat. L. 1511, but only by omitting therefrom the provision that "suit is to be instituted at any time before the expiration of six months after the end of the war"; thus removing the statute of limitations, and in no way altering the substance of the provisions of the statute under which this suit was instituted. The amended statute in force at the time when this suit was instituted was identical in all respects material to this controversy with the Section 9 as originally enacted (Act of October 6, 1917, ch. 106, 40 Stat. L. 419).

We shall later have occasion to refer to the conflict, or perhaps the confusion of authority on the subject of the allowance of interest on a debt between nationals of belligerent countries during the period of war, where a common law action is brought after the conclusion of hostilities for a recovery of the debt; but these cases are clearly not direct authorities upon the question of the allowance of interest where the suit is brought *not at Common Law to recover a personal judgment*, but under the provisions of a statute relating to the disbursement of funds to the creditors of alien enemies whose property has been seized by the Government.

X This question has once arisen in this Court in the case of *Miller v. Robertson*, 266 U. S. 243. In that case this Court permitted interest to be recovered for the whole period of the war. The facts in that case were, as we shall point out, indistinguishable in principle from the facts in this. By reason of the importance of the pronouncement,

we shall before comparing the facts quote fully what was said in that case by this Court in the opinion rendered by MR. JUSTICE BUTLER at pages 256-259 :

"The district court allowed interest from July 3, 1919; the circuit court of appeals from June 29, 1916. Appellants object on the ground that this is a suit against the United States, and interest is not allowable against it; that at common law interest was not recoverable, and the case was not a proper one for the exercise of chancery discretion; and that, if it was not an abuse of discretion to allow interest from the date when the war was practically ended, its allowance from June 29, 1916, was erroneous. In an attempt to commence an action in Utah against the buyers to recover damages resulting from their breach, the seller, on June 29, 1916, served a summons and complaint on the representatives of the buyers. On the facts found, which need not be repeated here, the circuit court of appeals (286 Fed. 511) rightly held the attempted service to amount to a demand, and that interest might be allowed from that date. See *Goddard v. Foster*, 17 Wall. 123, 143; *Kaufman v. Tredway*, 195 U. S. 271, 273; *United States v. Poulson*, 30 Fed. 231; *Dwyer v. United States*, 93 Fed. 616; *Mather v. Stokely*, 218 Fed. 764, 767.

"While the suit, as held in *Banco Mexicano v. Deutsche Bank*, 263 U. S. 591, 603 (affirming 289 Fed. 924), is one against the United States, the claim was not against it. No debt was alleged to be owing from it to the plaintiff. The rule of sovereign immunity from liability for interest (Judicial Code, Sec. 177; *National Volunteer Home v. Parrish*, 229 U. S. 494; *United States v. North American Co.*, 253 U. S. 330, 336; *Seaboard Air Line Ry. Co. v. United States*, 261 U. S. 299, 304) does not apply.

"Compensation is a fundamental principle of damages, whether the action is in contract or in tort. *Wicker v. Hoppock*, 6 Wall. 94, 99. One who fails to perform his contract is justly bound to make good all damages that accrue naturally from the breach; and the other party is entitled to be put in as good a position pecuniarily as he would have been by performance of the contract. *Curtis v. Innerarity*, 6 How. 146, 154. One who has had the use of money owing to another justly may be required to pay interest from the time the payment should have been made. Both in law and in equity, interest is allowed on money due. *Spalding v. Mason*, 161 U. S. 375, 396. Generally, interest is not allowed upon unliquidated damages. *Mowry v. Whitney*, 14 Wall. 620, 653. But when necessary in order to arrive at fair compensation, the court in the exercise of a sound discretion, may include interest or its equivalent as an element of damages. See *Bernhard v. Rochester German Insurance Co.* 79 Conn. 388, 397; *Frazer v. Bigelow Carpet Co.*, 141 Mass. 126; *Faber v. City of New York*, 222 N. Y. 255, 262; *De la Rama v. De la Rama*, 241 U. S. 154, 159, 160; *The Paquete Habana*, 189 U. S. 453, 467; *Eddy v. Lafayette*, 163 U. S. 456, 467; *Demotte v. Whybrow*, 263 Fed. 366, 368.

"In this case, at least as early as June 29, 1916, the date of demand, the seller was entitled to have from the buyers the difference between the sum which it would have received prior to that date, if the buyers had kept their contract, and the amount it received on resale. Payment in 1924 or later of that sum is not full compensation. Cf. *Seaboard Air Line Ry. Co. v. United States*, *supra*, 306. All damages had accrued prior to the demand. There was nothing dependent on any future event. The elements necessary to a calculation of the amount the seller was then entitled to have to make it whole—namely, the quantities of ore

produced, its metallic content, the prices to be paid by the buyers under the contract, and the amount realized on resale—were known or ascertainable. Our entrance into the war was long subsequent to June 29, 1916, the date of the demand. General representatives, who had long been in charge of the business in this country of Beer, Sondheimer & Company, remained here until after that event. At all times until it was taken over under the act, they had money and property of that firm more than sufficient to make good the seller's damages. It would be unjust and inconsistent with the remedial purposes of § 9 to hold that the seized enemy property cannot be held for the full amount of the seller's loss, and that, to the extent of interest during the period of the war, compensation must be denied. The proposition that the enemy defendants, as a matter of law, are entitled to be relieved from interest during the war, cannot be sustained. *Cf. Ward v. Smith*, 7 Wall. 447, 452; *Conn. v. Penn.* 6 Fed. Cas. No. 3, 104, pp. 282, 291; *Yeaton v. Berney*, 62 Ill. 61, 63; *Gates v. Union Bank*, 12 Heisk (Tenn.), 325, 330."

In that case the suit was brought for damages for breach of contract, and it was held that the damages were of such a character that their amount could be calculated with certainty, and that interest was consequently allowable and ran from the date of the breach.

In the case at bar the action is upon a stated account, and interest ran, of course, from the date as of which the account was stated (*Young v. Godbe*, 15 Wall. 562). Thus far there is no distinction between the cases, or if there be any, the case at bar is more clearly favorable to the allowance of interest.

In *Miller v. Robertson, supra*, the agent of the alien enemy had moneys belonging to the alien enemy in this country. This agent, however, had no authority to pay the claim of Robertson; and on the contrary, under the instructions of his principal the claim of Robertson was resisted as an unjust one. Having no authority to pay the claim, the agent had, of course, no authority to pay the interest which became due as damages for non-payment of the claim.

In this case it also appears that the German debtor had property in the United States sufficient to pay the claim, because such property was seized by the Alien Property Custodian (R. 9); but, it does not appear whether it was an agent of the alien enemy who held the property belonging to the alien enemy in this country, or whether the persons who held the property seized by the Alien Property Custodian were simply depositaries or debtors.

It seems obvious that whether interest is recoverable for the period of the war in an action brought against the Alien Property Custodian under Section 9(a) of the Trading with the Enemy Act cannot depend upon whether the property seized by the Alien Property Custodian was held by an agent of the alien enemy who was *not* authorized to pay either the principal or the interest of the claimed indebtedness, or whether it was held by a simple depositary or by a debtor who was equally unauthorized to make such payment.

If it had appeared in *Miller v. Robertson, supra*, that the agent of the alien enemy was authorized to pay the debt, and the interest too, and had not paid it, then there would be indeed a distinction in the facts between that case and the case at bar,

and it might be argued whether such a distinction ought to make a difference in the result.

Since, however, the agent of the alien enemy in *Miller v. Robertson, supra*, was not an agent to pay, but an agent to *refuse* payment, there is not even a distinction. The agent in that case, while an agent for other purposes, was, so far as concerns the payment of the debt to Robertson, just as much and no less merely a depositary for the alien principal or a debtor to his alien principal, as the persons from whom the Alien Property Custodian seized the property of Delbrück, Schickler & Co., which is to be applied to the payment of the plaintiffs' debt, were merely depositaries of or debtors to Delbrück, Schickler & Co.

The case of *Miller v. Robertson, supra*, is, therefore, a direct authority in favor of the proposition that, in an action such as this, interest should have been allowed from the period from April 6, 1917 to July 14, 1919, as well as for the periods prior and subsequent thereto.

But if the case of *Miller v. Robertson, supra*, be deemed not a direct decision in favor of our contention, then we submit that an examination of the authorities will lead, contrary to the view of the learned District Judge, who was inclined to take our view if the matter had been deemed by him to be *res nova* (R. 10), to the same conclusion.

So far as our research has disclosed, there are only three decisions on the question of interest to be allowed during war upon debts owing by a citizen of one belligerent country to a citizen of another, that are binding in this Court. We summarize their holdings as follows:

(1) Where an action is brought to recover a personal judgment upon a debt from a citizen of one belligerent to a citizen of another which fell due

at a time when war was waging, *and had not borne interest, by its terms, prior to the time of maturity*, interest may not be recovered for the period prior to the cessation of hostilities. *Brown v. Hiatts*, 15 Wall. 177.

(2) In the event, however, that upon the falling due of such a debt during the period of war, the enemy *creditor* has an agent in the country of the debtor to receive payment of the debt, interest will run if the payment is not made. The war is not deemed to terminate the agency established by the enemy creditor for the purpose of receiving payment of the debt. *Ward v. Smith*, 7 Wall. 447.

(3) In the event that the enemy *debtor* has property in the hands of an agent in the country of the creditor *even though the agent has no authority to devote it to the payment of the debt, and is under instructions from his principal not to do so*, interest will continue to run. *Miller v. Robertson*, 266 U. S. 243.

To which of these situations is the present case, *where the enemy debtor has property in this country sufficient to pay the debt*, more analogous? It is a question that seems to answer itself, and the answer is confirmed as the logical result of collateral doctrines of law.

It should be remembered that an enemy national, while he may not bring suit in the courts of this country during the pendency of war, *is at all times subject to having suit brought against him*, if jurisdiction can be obtained. This is well settled law, both here and in England.

*McVeigh v. United States*, 11 Wallace 259, by SWAYNE, J., at page 267 (*italics ours*) :

"Whether the legal *status* of the plaintiff in error was, or was not, that of an alien enemy, is a point not necessary to be considered; be-

cause, apart from the views we have expressed, conceding the fact to be so, the consequences assumed would by no means follow. Whatever may be the extent of the disability of an alien enemy to sue in the courts of a hostile country (*Clarke v. Morey*, 10 Johnson 69; *Russel v. Skipwith*, 6 Binney 241), it is clear that he is liable to be sued, and this carries with it the right to use all the means and appliances of defense. In Bacon's Abridgment (Title Alien D; see also Story's Equity Pleading, § 53; *Albrecht v. Sussman*, 2 Vesey & Beans, 326; *Dorsey v. Kyle et al.*, 30 Maryland, 512, 522), it is said: 'For as an alien may be sued at law, and may have process to compel the appearance of his witnesses, so he may have the benefit of a discovery.' "

*Robinson & Co. v. Continental Insurance Co. of Mannheim* [1915], 1 K. B. 155, by BAILHACHE, J., at page 161:

"I have come to the conclusion that there is no rule of common law which suspends an action in which an alien enemy is defendant, and no rule of common law which prevents his appearing and conducting his defense."

There are two ways in which an action could be instituted against an alien enemy; the one, by personal service, and the other, by an attachment against his property. Personal service in this case would have been impracticable; but since the alien enemy had property in this country sufficient to pay the debt the action could have been maintained by the issuance of an attachment, garnishment or similar trustee process. This possibility existed from April 6, 1917, until the property was seized by the Alien Property Custodian, probably some considerable period of time after October 6, 1917; and the Alien Property Custodian concedes that after he



seized the property he, or the President, had the right, although not the obligation, of paying the debt owing to plaintiffs. We respectfully submit *that it results from the fact that an action might have been maintained for the recovery of the debt, that interest continued to run.*

That is to say, the decisions in this Court seem to support the following distinction, that where an action may be maintained for the recovery of a debt *quasi in rem* so that the question of personal obligation is not involved, then interest may be recovered for the period of the war; but where the action is purely *in personam* based upon the breach of a personal obligation to pay, then the impossibility of payment may be a defense to the claim for interest. An action under Section 9 of the Trading with the Enemy Act is purely *in rem*, as it binds only the property of the alien enemy seized by the Alien Property Custodian; and since under the terms of Section 9, the debt may be paid out of that property, even during the continuance of the war, there is no reason why interest, as an incident of the debt, should not likewise be so paid. It is to be noted that Section 9 of the Trading with the Enemy Act substantially in its present form, was enacted as early as October 6, 1917 (ch. 106, 40 Stat. L. 419).

It may be of value to examine the English Law on the subject, and compare it with the mass of American decisions as developed in the courts of the various states. There is no confusion on the subject in English Law.

*Hugh Stevenson & Sons, Limited, v. Aktiengesellschaft für Cartonnagen-Industrie* [1917] 1 K. B. 842, by SWINFEN EADY, *L. J.*, at page 850:

“A debt which by law carries interest, and which is owing to an enemy, does not cease to

X carry interest by reason of the war, although the enemy cannot enforce payment until the return of peace. If the principal of the debt is not confiscated, why should the interest be confiscated? The learned Judge below said: 'Enemy property in this country is not to be confiscated'; yet the effect of the judgment is to confiscate the interest, as if the defendant had not been an enemy he would certainly have claimed interest. In *Wolff v. Oxholm* (1817), 6 M. & S. 92, the plaintiffs recovered against the defendant, who had formerly been an enemy, a large sum for interest which accrued during the war. In like manner interest must run in favor of an enemy during the war, although not then actually payable to him."

This was decided by the Court of Appeal with one dissenting Lord Justice, and was appealed to the House of Lords, where the decision was unanimously affirmed.

*Hugh Stevenson & Sons v. Aktiengesellschaft für Cartonnagen-Industrie* [1918], A. C. 239, by Lord Chancellor FINDLAY at page 245:

"This appears to me to follow from the principle that the property of an enemy is not confiscated though his right to have it back is suspended during war. It was strenuously contended that in the case of a debt to a foreigner bearing interest, no interest could accrue during the existence of hostilities between the countries of the debtor and creditor, and in support of this proposition two American cases were cited, *Hoare v. Allen*, 2 Dall. 102, and *Brown v. Hiatts*, 15 Wall. 177, the latter a decision of the Supreme Court of the United States.

"These decisions seem to me not to be in conformity with English law. The rule of international law on this point, in the view of the courts of this country, does not appear to have

formed the subject of any express decisions in England. The judgment of Lord Ellenborough, however, in *Wolff v. Orholm*, 6 M. & S. 92, appears to me to imply that, in the view of Lord Ellenborough, interest on such a debt would not cease to run during the continuance of the war, but the point does not appear to have been argued. It is difficult to see on what principle the interest is to be forfeited if private property is to be respected."

It seems to us that the English decisions state the sound rule in the most general terms, and we have carefully examined the American decisions to get a hint, if we could, of the reason for the contradictory results which seem to obtain. We can find only a historical explanation, which we respectfully submit to the Court:

The cases first arose after the American Revolution. The creditors, of course, were always English; the debtors were the victorious but impoverished Americans. Is it to be wondered at that cases were then decided to the effect that the American debtor should not be obliged to pay interest to the English creditor during the seven year period that England was seeking to suppress and obliterate the new American nation? Such decisions were rendered in *Hoare v. Allen*, 2 Dall. 102; *Forcraft v. Nagle*, 2 Dall. 132, and in *Conn v. Penn*, Peters Circuit Court 496.

There were cases, however, on the other side. The South Carolina Court decided that the English creditor was entitled to interest in *Neilson v. Rutledge*, 1 Dessauss. Eq. 194, and referred to an apparently unreported decision of the Chief Justice of the United States Supreme Court sitting at Circuit in Connecticut to the same effect.

The next and only other time when this question became urgent in the history of this country was after the Civil War, when northern creditors pursued southern debtors. The first case which came up to be decided was in the United States Circuit Court in North Carolina in which Chief Justice CHASE rendered the opinion. This case, by order of the Supreme Court of the State of North Carolina (undoubtedly at that time a Carpet-Bag Court), is reported in the North Carolina reports as *Shortridge v. Macon*, 61 N. C. 392. In that case Chief Justice CHASE held that interest was payable by the southern debtor to the northern creditor, because, irrespective of whether interest was payable for the period of a war, and he conceded that it would not be, undoubtedly to make his argument stronger, yet the Southerners had not been engaged in war, but in *treason*, and the treasonable citizen and rebel to the Union could not assert his treason as an excuse for not paying his debt with interest to the loyal citizen.

It was not to be expected that this doctrine would be accepted by the courts of the southern states in which the northern creditors sued to recover their debts. Nor was it to be expected that this inflammatory opinion of Chief Justice CHASE would be followed when the common sense and equity and fairness of the country realized that if the United States were to be truly united, the Confederates must not be looked upon as traitors, and must be accorded the rights of vanquished belligerents on the one hand, and treated as equal citizens of the United States on the other.

In the many cases decided in the south, therefore, the southern case of *Neilson v. Rutledge*, *supra*, decided after the revolutionary war is never once

mentioned; but they all refer to the northern case of *Conn v. Penn*, *supra*, decided in the Pennsylvania United States Circuit Court by Mr. Justice WASHINGTON, whose name was enough to establish its authority. It may be noted parenthetically that all the post-revolutionary cases denying interest, which are now referred to as leading cases, were decided in the single State of Pennsylvania. These southern cases which refuse to follow the post-revolutionary *southern* case of *Neilson v. Rutledge*, *supra*, and follow the post-revolutionary *northern* case of *Conn v. Penn*, *supra*, are:

*Mayer v. Reed & Co.*, 37 Georgia 482;  
*McGaughy, Parker & Co. v. Leon Berg & Co.*, 4 Heisk., 695;  
*Pillow v. Brown & Childress*, 26 Ark. 240;  
*Brewer v. Hastie & Co.*, 3 Call. 22;  
*McVeigh v. The Bank of the Old Dominion*, 26 Gratt. 188;  
*Walker v. Beauchler*, 27 Gratt. 511;  
*Fred v. Dixon*, 27 Gratt. 541;  
*Selden v. Preston*, 11 Bush. 191.

The state courts in the north, when northern creditors could get hold of their southern debtors to subject them to the jurisdiction of *northern* courts, decided differently.

*Lash v. Lambert*, 15 Minn. 416 by RIPLEY, *Ch. J.*, p. 424:

"But in the case of *Shortridge v. Mason*, in the U. S. Circuit Court for North Carolina, 2 *Am. Law Rev.* p. 95, Chase, *C. J.*, held that these cases were inapplicable to the case of a debt due from a citizen of North Carolina to a citizen of Pennsylvania, and that interest thereon was not suspended during the rebellion. This was obviously correct, for it was the treason of

the rebel, that brought about the prohibition of intercourse that followed upon the outbreak of the rebellion.

"To claim exemption from the payment of interest on the ground, that he was not in default in not paying, because the law had prevented him from so doing, would be, to take advantage of his own wrong. *Harper et al. v. Ely, Cook Co., Ill. Circuit Court, July 26, 1870. Reported Chicago Legal News of July 30, 1870.* Nevertheless, we think the principle on which the cases first referred to are based would be applicable to the case of debts due from citizens of the United States, to citizens of the rebel states.

"It was no fault of loyal citizens, that all intercourse became unlawful between themselves and the rebels; that all such was prohibited by positive law. (*See Act of Congress, July 13, 1861.*) In the words of the case last cited, 'numberless cases can be found which assert that laches during war will not be imputed by any state to its own loyal citizens.'"

*Yeaton v. Berney, 62 Ill. 61.*

To these northern cases may be added the case of *Spencer v. Brower, 32 Texas 663*, which decided that interest ran against a southern debtor in favor of the northern creditor, following the reasoning of *Shortridge v. Macon, supra*, and we think that the tenor of the opinion sufficiently indicates that the Texas Court at that time was a "Carpet-Bag" court.

With the change in sentiment toward the south which later came about, the Supreme Court in *Brown v. Hiatt, 15 Wall. 177*, in a case where the debt did not become payable until after the war began, and *was drawing no interest before the war began*, stated that interest did not run during the war.

We have now traced the history of what seems to us to be the utterly illogical dogma, unrecognized in the Common Law as interpreted in England, that the payment of interest is not only suspended during the period of the war, when the principal also may not be paid, but may also not be recovered after the war is over at the time when the principal must be paid. This doctrine is not even logically applied. No one has yet claimed that the interest represented by a coupon on a corporate bond is not ultimately payable simply because the holder of that coupon is an alien enemy. As a matter of fact, the Alien Property Custodian has always insisted, and now insists, and we think with perfect propriety, that such coupon is payable, that the obligation which it represents is not nullified simply because the holder of it happens to be an alien enemy, and he insists upon collecting it and does collect it. Whether the claim for interest, which has come into being and was running prior to the commencement of the war, is represented by a physical piece of paper, or not, would seem to us to be utterly immaterial.

It may be observed that in none of the cases which decided that interest was not allowed was it decided that this result would occur if the enemy debtor had property in this country during the war which could be used in payment of the debt. Even if the confused mass of American decisions (which the note-writer in *L. R. A.* 1917-C, 672 has so hard a time in distinguishing from one another on their facts when the decisions are contradictory) will not allow this Court to assert the simple and just rule adhered to as the common law rule in England, all analogies in those decisions, and the logical result of the rule established by this Court that an enemy alien may be sued during

war, require the allowance of interest where the alien debtor had property in this country available for the payment of the debt.

As lending some color to this distinction we may refer to the cases which hold that interest may be recovered from a surety of an alien enemy debtor even during the period of the war.

*Bean v. Chapman*, 62 Ala. 58: In an action by the maker against the surety on a note, it was held that while the maker and payee were alien enemies, nevertheless, interest could be recovered for the period of the war against the surety, who throughout the war was on the Confederate side of the lines.

By Stone, *J.*, at page 64:

"The plaintiff and defendants in this suit, at no time sustained the relation of alien enemies to each other. During the entire prevalence of that fierce conflict, they inhabited co-terminous counties in this State. The plaintiff could at any time have received payment from defendants, and the defendants could at any time have paid the plaintiff without violating any rule of law. \* \* \* At any time suit could have been prosecuted on this action between these parties, and the money due, with interest, might have been coerced out of these defendants, even before the close of the war. The case of *Paul v. Christie*, 4 Har. & McH. 161, is not distinguishable from this. It was there held that the plaintiff was entitled to full interest, notwithstanding the war. In such case the principal's defense is personal and does not affect or impair the surety's liability."

In *Dean v. Christie*, 4 H. & McH. (Maryland) 161, a British principal and an American surety executed a bond to the plaintiff, an American resident in Maryland. It was held that the payee might recover interest accruing during the Revolutionary War.



## (B)

## Under the Treaty Provisions.

To clarify our discussion, it may be as well to state in advance not only what we do claim, but also what we do not claim to be the effect of the provisions of the Treaty of Peace between Germany and the United States (Treaty Series No. 658).

We do *not* claim that the Treaty of Peace with Germany provides generally that upon claims of nationals of the United States against nationals of Germany there shall be allowed interest for the period of the war.

We do *not* claim that there is any provision of the Treaty of Peace with Germany which treats specifically or inferentially with the general subject of the allowance of interest for the period of the war upon claims of American nationals against German Nationals.

We *do* claim that the Treaty of Peace with Germany prescribes specifically that when the American Government in accordance with its own law pays the claims of German nationals out of the property of German nationals seized by it, then those claims shall be paid with interest for the period of the war.

In other words, in actions brought under Section 9 of the Trading with the Enemy Act, or in the case of voluntary payments by order of the President under Section 9 of the Trading with the Enemy Act, in respect of claims of American citizens for the payment of debts owing to them by German nationals out of their property seized by the Alien Property Custodian, interest is to be allowed for the period of the war.

The Treaty of Peace with Germany was made pursuant to the joint resolution with Congress embodied in Act of July 2, 1921 (42 Stat. L. 105), the relevant portions of which are as follows:

"That the state of war declared to exist between the Imperial German Government and the United States of America by the joint resolution of Congress approved April 6, 1917, is hereby declared at an end.

"Sec. 2. That in making this declaration, and as a part of it, there are expressly reserved to the United States of America and its nationals any and all rights, privileges, indemnities, reparations, or advantages, together with the right to enforce the same, to which it or they have become entitled under the terms of the armistice signed November 11, 1918, or any extensions or modifications thereof; or which were acquired by or are in the possession of the United States of America by reason of its participation in the war or to which its nationals have thereby become rightfully entitled; or which, under the treaty of Versailles, have been stipulated for its or their benefit; or to which it is entitled as one of the principal allied and associated powers; or to which it is entitled by virtue of any Act or Acts of Congress; or otherwise."

The Treaty of Peace with Germany, of which ratifications were exchanged on November 11th, 1921, and which was proclaimed on November 14th, 1921, after reciting the above quoted provision of the Act of Congress, contains the following:

#### ARTICLE I.

Germany undertakes to accord to the United States, and the United States shall have and enjoy, all the rights, privileges, indemnities, reparations or advantages specified in the afore-

said Joint Resolution of the Congress of the United States of July 2, 1921, including all the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles which the United States shall fully enjoy notwithstanding the fact that such Treaty has not been ratified by the United States.

## ARTICLE II.

With a view to defining more particularly the obligations of Germany under the foregoing Article with respect to certain provisions in the Treaty of Versailles, it is understood and agreed between the High Contracting Parties:

(1) That the rights and advantages stipulated in that Treaty for the benefit of the United States, which it is intended the United States shall have and enjoy, are those defined in Section 1, of Part IV, and Parts V, VI, VIII, IX, X, XI, XII, XIV and XV.

The United States in availing itself of the rights and advantages stipulated in the provisions of that treaty mentioned in this paragraph will do so in a manner consistent with the rights accorded to Germany under such provisions." (Treaty Series No. 658, p. 5.)

The attention of the Court is respectfully invited also to the Resolutions of the Senate of the United States of October 18, 1921 (61 Congressional Record 6438, First Session, 67th Congress)—two-thirds of the senators present concurring therein—by which the Senate gave its advice and consent to the ratification of this treaty, subject to the understanding, made a part of the Resolution of Ratification

"That the rights and advantages which the United States is entitled to have and enjoy under this Treaty embraced the rights and advantages of nationals of the United States

specified in the Joint Resolution or in the provisions of the Treaty of Versailles, to which this treaty refers."

The effect of the Treaty of Peace with Germany is that the United States and its citizens are entitled to have and enjoy all the rights and advantages defined in those parts of the Treaty of Versailles specified in the Treaty of Peace with Germany, which are for that purpose incorporated into our own Treaty of Peace with Germany, and which accordingly have the force of law (Authorities *infra*, pp. 36-41).

Part X of the Treaty of Versailles (Senate Document No. 49, First Session, 66th Congress) incorporated into our Treaty of Peace with Germany (Article II, *supra*, p. 28) contains the sections establishing the right of an American citizen, in an action such as this, to recover interest on his claim for the period of the war.

It is called "Economic Clauses" and Section III thereof entitled "Debts", and Section IV thereof entitled "Property, Rights and Interests" contain the relevant provisions. A copy of these Sections is annexed to the brief as the Appendix.

Broadly speaking, two methods of payment of debts are prescribed in the Treaty: *First*, by the establishment of an International Clearing Office, in which event the Power adhering to the International Clearing Office surrenders the property of German nationals seized by it during the war to the control of the International Clearing Office; and *Secondly* by the autonomous action of a Power not adhering to the International Clearing Office, in which case it may retain the property seized by it for disposal in accordance with its own laws.

The first method is provided by Section III em-

bracing Article 296, and the Annex thereto, and comes into effect only in case a Power gives notice to Germany within one month after the ratification of the Treaty of Peace that it desires to join in the establishment of an International Clearing Office. (sub-division (*e*) of Article 296). This the United States has not done and it has consequently retained autonomy with respect to the disposition of the property of German nationals seized during the war.

Section IV, however, conferring or confirming this autonomy, does prescribe that in such case the nationals of the Power which retains this autonomy shall have none the less certain rights and advantages which they would have if the Power had joined in the establishment of an International Clearing Office (Treaty of Versailles, Annex to Section IV of Part X, Sub-division 14, *infra*, p. 32) ; and those rights and advantages belong, therefore, to citizens of the United States (Treaty of Peace, Article II, *supra*, p. 28).

Among these rights so stipulated is that when any Power pays debts of German nationals to its own nationals out of funds seized by it during the war, then those debts are to be paid with interest for the period of the war (Treaty of Versailles, Annex to Section III of Part X, Subdivision 22, *infra*, p. 33).

The Circuit Court of Appeals came to the conclusion that Section IV of Part X of the Treaty of Versailles did not cover the payment of debts owing by German nationals to American nationals out of funds seized by the Alien Property Custodian, and that consequently the provision for the payment of interest did not apply to them. This view, we think, is clearly erroneous, as will appear from a reading of the relevant provisions of the Treaty of Versailles.

Subdivision (2) of paragraph (h) of Article 297 (Section IV) provides as follows (the omitted portion dealing with the obligation of Germany to restore property to the owners thereof—italics ours) :

“(2) As regards Powers not adopting Section III and the Annex thereto, \* \* \* *the proceeds of the property, rights and interests, and the cash assets, of German nationals received by an Allied or Associated Power* shall be subject to disposal by such Power in accordance with its laws and regulations and *may be applied in payment of the claims and debts defined by this Article or paragraph 4 of the Annex hereto.*”

Sub-division 4 of the Annex to Section IV is as follows (italics ours) :

“All property, rights and interests of German nationals within the territory of any Allied or Associated Power and the net proceeds of their sale, liquidation or other dealing therewith may be charged by that Allied or Associated Power in the first place *with payment of amounts due in respect of claims by the nationals of that Allied or Associated Power with regard to their property, rights and interests, including companies and associations in which they are interested, in German territory, or debts owing to them by German nationals, and with payment of claims growing out of acts committed by the German Government or by any German authorities since July 31, 1914, and before that Allied or Associated Power entered into the war.*”

These provisions establish not only that the “property, rights and interest and the cash assets of German nationals received by an Allied or Associated Power” shall be subject to disposal by such Power in accordance with its laws and regulations, but also that they “may be applied in payment of the claims and debts defined in Paragraph 4 of

the Annex to Article 297". Paragraph 4 of the Annex to Article 297 specifically provides that *among the claims to which the seized property may be applied by a Power which does not join in the establishment of an International Clearing Office (or, as expressed in the Treaty, "as regards Powers not adopting Section III and the Annex thereto") are debts owing to nationals of that Allied or Associated Power by German Nationals.*

It being thus clearly provided that Section IV deals with the payment (out of seized property) of debts owing by German nationals to nationals of an Allied or Associated Power which has not joined in the establishment of an International Clearing Office, we shall examine it to see whether it contains any provisions with respect to the amount in which such debts shall be allowed.

Subdivision 14 of the Annex to Section IV of Part X provides as follows (*italics ours*) :

"The provisions of Article 297 and this Annex, relating to property, rights and interests in an enemy country, and the proceeds of the liquidation thereof, *apply to debts, credits and accounts, Section III regulating only the method of payment.*

"In the settlement of matters provided for in Article 297 between Germany and the Allied or Associated States, their colonies or protectorates, or any one of the British Dominions or India, in respect of any of which a declaration shall not have been made that they adopt Section III, and between their respective nationals, *the provisions of Section III respecting the currency in which payment is to be made and the rate of exchange and of interest shall apply unless the Government of the Allied or Associated Power concerned shall within six months of the coming into force of the present Treaty notify Germany that the said provisions are not to be applied.*"

The United States has not made a declaration adopting Section III, but on the other hand it has given no notice rejecting the provisions of Section III respecting the currency in which payment of debts is to be made and the rate of exchange and the rate of interest. *To that extent*, therefore, Section III of Part X (devoted primarily to the provisions relating to International Clearing Offices) is operative in cases where the United States, out of funds seized by the Alien Property Custodian, pays debts owing by German to American nationals, and we must look to the substantive provisions therein contained.

Since it appears from the portions of the Treaty of Versailles which we have quoted that the substantive provisions of Section III of Part X, so far as they relate to the currency in which payment is to be made, the rate of exchange and the rate of interest, apply to the payment of debts owing by German nationals to the nationals of an Allied or Associated Power out of property of German nationals seized by an Allied or Associated Power, we shall next examine these provisions of Section III to determine what they provide with respect to the payment of interest during the war.

On the question of the allowance of interest Subdivision 22 of the Annex to Section III provides as follows:

"The rate of interest shall be 5 per cent. per annum except in cases where, by contract, law or custom, the creditor is entitled to payment of interest at a different rate. In such cases the rate to which he is entitled shall prevail.

"Interest shall run from the date of commencement of hostilities (or, if the sum of money to be recovered fell due during the war, from the date at which it fell due) until the sum is credited to the Clearing Office of the creditor."



The effect of these provisions is that Germany in the Treaty of Versailles concedes as a right, privilege and advantage to the citizens of any Allied or Associated Power, that in the payment of debts owing by German nationals to the nationals of that Allied or Associated Power, whether (a) through the International Clearing Office or (b) through the application to such payment of property seized by the Allied or Associated Power, *interest shall be allowed for the period of the war.*

In adopting Part X of the Treaty of Versailles as a part of the separate Treaty of Peace between the United States and Germany (*supra*, p. 28), we think it is clear beyond the realm of argument that it was the intention of the President and of the Senate *to assure to the United States and to its nationals the same rights, so far as expressed in Part X, which the United States and its nationals would have had if the Treaty of Versailles had itself been ratified by the Senate.*

If the Treaty of Versailles had been ratified by the Senate, the United States would have had the right within one month thereafter to join with Germany in the establishment of an International Clearing Office. In that event unquestionably debts proved through the International Clearing Office owing by German nationals to American citizens would have been allowed with interest for the whole period of the war (Treaty of Versailles, Subdivision 22 of the Annex to Section III of Part X, *supra*, p. 33).

If the United States did not desire to join in the establishment of an International Clearing Office, it was, by the Treaty of Versailles, expressly permitted to retain the property seized by it and to apply the same to the payment of debts owing to American citizens by German

nationals (Treaty of Versailles, Subdivision (2) of Paragraph (h) of Article 297, and Paragraph 4 of the Annex to Article 297, *supra*, p. 31); and it was specifically provided that in the settlement of matters provided for in Article 297 between "Germany and the Allied or Associated States \* \* \* and between their respective nationals the provisions of Section III respecting the currency in which payment is to be made and the rate of exchange and of interest shall apply" (Treaty of Versailles, Subdivision 14 of the Annex to Section IV of Part X, *supra*, p. 32).

The Treaty of Versailles was drafted by men of different languages to settle all the divers affairs of the world dislocated by four years of shock; its English version is in parts, perhaps, not a model of style, and some of its provisions may appear awkward and obscure. On the other hand, of this we may be certain, that with the crowd of matters which required adjustment, no vain word is spoken in the Treaty. Each clause was intended to have meaning and effect.

The clauses which we have quoted can have, we submit, only a single meaning, the meaning which we have attributed to them, and which they quite clearly express. And this, moreover, is supported by the history of events which are still so recent that they are fresh in memory. That there was a strong sentiment in the United States against the relinquishment of property seized by the Alien Property Custodian is evidenced by Section 5 of the joint resolution of Congress which declared the peace almost three years after the Armistice (42 Stat. L. 105). It could scarcely be stronger at the time of the formulation of the Treaty of Versailles, and it certainly was not weaker at that time. To release seized property to be dealt

with by an International Clearing Office was so contrary to the feeling prevailing in the United States that the American delegates to the Peace Conference necessarily had to insist upon a provision allowing any country to retain the seized property and itself administer it. In doing so, however, they had equally to insist that American creditors should be given the same rights as they would have were the property administered by an International Clearing Office. The provisions which we have quoted were obviously inserted with that purpose and effect. They have become the law of the land through their incorporation into the Treaty of Peace between the United States and Germany (*supra*, p. 28). That this is so is established, we think, beyond question by the authorities.

#### *Authorities.*

Art. VI of the Constitution of the United States reads in part as follows :

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

It is well established by judicial decision that a treaty duly made under the authority of the United States is as much a part of the law of the United States as an act of Congress or the Constitution itself.

*Ware v. Hylton*, 3 Dall. (U. S.) 199;

*In re Parrott*, 1 Fed. 481;

*Chae Chan Ping v. U. S.*, 130 U. S. 581;

*Whitney v. Robertson*, 124 U. S. 190;

*In re Ah Lung*, 18 Fed. 28;  
*Bartram v. Robertson*, 15 Fed. 212;  
*Blythe v. Hinckley*, 173 U. S. 501, 508;  
*Hauenstein v. Lynham*, 100 U. S. 483.

During the debate in the House of Representatives on the Jay Treaty, Chief Justice Ellsworth in a written opinion communicated to Jonathan Trumbull on March 13, 1796, said:

"The instant the President and Senate have made a treaty the Constitution makes it a law of the land; and of course all persons and bodies in whatsoever station or department, within the jurisdiction of the United States, are bound to conform their actions and proceedings to it. Such a treaty *ipso facto* repeals all existing laws, so far as they interfere with it." (Manuscript letters to Washington CXVII, 287; cited by Crandall,—*"Treaties, their Making and Enforcement"*, pp. 115, 116.)

There have been some enlightening cases involving private rights decided under the provisions of Article IV of the Definitive Treaty of Peace between the United States and Great Britain concluded at Paris September 3, 1783, which article reads as follows (italics ours):

"It is agreed that creditors on either side shall meet with no lawful impediment to the recovery of *the full value in sterling money*, of all *bona fide* debts heretofore contracted." (Malloy *"Treaties, Conventions, International Acts, Protocols & Agreements between the United States of America and other powers, 1776-1909"*, Vol. 1, p. 586.)

The leading case under this article of the treaty is the case of *Ware v. Hylton* (1796), 3 Dallas 199, in which the question before the court was, as stated

by Mr. Justice CHASE at page 234, "whether the 4th article of the said treaty nullifies the law of Virginia, passed on the 20th of October 1777; destroys the payment made under it; and revives the debt, and gives a right of recovery thereof, against the original debtor?"

After quoting from the sixth article of the Constitution, which provides "that all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding", Mr. Justice CHASE proceeds as follows at page 238 (*italics ours*):

"I will now proceed to the consideration of the treaty of 1783. It is evident, on a perusal of it, what were the great and principal objects in view by both parties. There were four on the part of the United States, to wit: 1st. An acknowledgment of their independence by the crown of Great Britain. 2d. A settlement of their western bounds. 3d. The right of fishery. And 4th. The free navigation of the Mississippi. There were three on the part of Great Britain, to wit: 1st. A recovery by British merchants, of the value in sterling money, of debts contracted, by the citizens of America, before the treaty. 2d. Restitution of the confiscated property of real British subjects, and of persons residents in districts in possession of the British forces, and who had not borne arms against the United States; and a conditional restoration of the confiscated property of all other persons. And 3d. A prohibition of all future confiscations and prosecutions. The following facts were of the most public notoriety, at the time when the treaty was made, and therefore, must have been very well known to the gentlemen who assented to it. 1st. That

British debts, to a great amount, had been paid into some of the state treasuries, or loan-offices, in paper money of very little value, either under laws confiscating debts, or under laws authorizing payment of such debts in paper money, and discharging the debtors. 2d. That tender laws had existed in all the states; and that by some of those laws, a tender and a refusal to accept, by principal or factor, was declared an extinguishment of the debt. From the knowledge that such laws had existed, there was good reason to fear, that similar laws, with the same or less consequences, might be again made (and the fact really happened), and prudence required to guard the British creditor against them. 3d. That in some of the states, property of any kind might be paid, at an appraisement, in discharge of any execution. 4th. That laws were in force in some of the states, at the time of the treaty, which prevented suits by British creditors. 5th. That laws were in force in other of the states, at the time of the treaty, to prevent suits by any person, for a limited time. All these laws created legal impediments, of one kind or another, to the recovery of many British debts, contracted before the war; and in many cases, compelled the receipt of property instead of gold and silver."

and further at pages 240-241 :

"I will examine the 4th article of the treaty in its several parts; and endeavor to affix the plain and natural meaning of each part. To take the 4th article, in order, as it stands :

\* \* \* \* \*

3d. "Shall meet with no lawful impediment", that is, with no obstacle (or bar) arising from the common law, or acts of parliament, or acts of congress, or acts of any of the states, then in existence, or thereafter to be made, that would, in any manner, operate to prevent the recovery of such debts as the treaty contem-

plated. A lawful impediment to prevent a recovery of a debt can only be matter of law, pleaded in bar to the action. If the word lawful had been omitted, the impediment would not be confined to matter of law. The prohibition that no lawful impediment shall be interposed, is the same as that all lawful impediments shall be removed. The meaning cannot be satisfied by the removal of one impediment, and leaving another; and *a fortiori*, by taking away the less and leaving the greater. These words have both a retrospective and future aspect.

4th. "To the recovery", that is, to the right of action, judgment and execution, and receipt of the money, without impediments in courts of justice, which could only be by plea (as in the present case), or by proceedings, after judgment, to compel receipt of paper money or property, instead of sterling money. The word recovery is very comprehensive, and operates, in the present case, to give remedy from the commencement of suit, to the receipt of the money.

5th. "*In the full value in sterling money*", that is, *British creditors shall not be obliged to receive paper money, or property at a valuation, or anything else but the full value of their debts, according to the exchange with Great Britain.* This provision is clearly restricted to British debts, contracted before the treaty, and cannot relate to debts contracted afterwards, which would be dischargeable according to contract, and the laws of the state where entered into. This provision has also a future aspect in this particular, namely, that no lawful impediment, no law of any of the states made after the treaty, shall oblige British creditors to receive their debts, contracted before the treaty, in paper money, or property at appraisement, or in anything but the value in sterling money. The obvious intent of these

words was, to prevent the operation of past and future tender laws; or past and future laws, authorizing the discharge of executions for such debts by property at a valuation."

Other cases holding to the same effect are:

- State of Georgia v. Brailsford*, 3 Dall. 1;  
*Ogden v. Blackledge*, 2 Cranch 272;  
*Hopkirk v. Bell*, 3 Cranch 454, 4 Cranch 164;  
*Higginson v. Mein*, 4 Cranch 415;  
*Jones v. Walker* (opinion by JAY, C. J., not dated), 2 Paine 688;  
*Page v. Pendleton*, 1 Wythe's Repts. (Va.) 211, 217;  
*Hamilton & Co. v. Eaton*, 1 Hughes 249;  
*Hylton's Lessee v. Brown*, 1 Wash. C. C. 298 and 343;  
*Dunlop & Wilson v. Alexander's Admin.*, 1 Cranch C. C. 498;  
*McNair v. Ragland, et al.*, 16 N. C. 520, 526.

## POINT II.

**There is no error in the decree below on the question of the rate of exchange.**

(A)

### General Discussion.

Whether the amount of a debt owing by a German to an American before the Great War was expressed in dollars or in marks was usually a matter of accident. Such a debt necessarily arose out of an actual transaction involving real values, that is, the value of what was involved compared



X with other values, and this was expressed in a medium of exchange, *i. e.*, money, of one country or another; and since both Germany and the United States at that time were operating their monetary systems on an actual gold standard, the relations between their respective currencies were relatively stable, affected before the United States entered the war only to a comparatively small and gradual extent by the fact that the blockade of Germany by the Allies made gold shipments to the United States impossible, thus permitting a fall of exchange below the pre-war gold shipment point.

X The contention of the Alien Property Custodian is that if an indebtedness from a German to an American happened to be expressed in *dollars*, the amount now recoverable is measured in dollars, but that if that indebtedness had happened to be expressed in German *marks*, then, in substance, *nothing* can be recovered, although the respective values involved in the two transactions were precisely the same.

The fundamental error of the Alien Property Custodian is that instead of regarding the debt as a debt, he assumes that a debt from A to B expressed in marks means that A has so many marks in his possession which belong to B, and that a suit to recover upon the debt is in the nature of an action of replevin to recover the specific marks which B owns but which are in A's possession.

If the true nature of the transaction be regarded, that is, that the debt arises out of a transaction involving real values, the often grotesque and always unjust and discriminatory results of the contention of the Alien Property Custodian are immediately dissipated.

In order that we may not seem to claim too much, let us say that we appreciate fully that a govern-

ment has an inherent right to make *fiat* money, and may declare that a medium of exchange, even though, by inflation, the same amount of units of the same formal name no longer represent any actual value but the merest scintilla of the value represented by the same number of units of the same name in which the debt was originally expressed, must be taken in payment of the debt,—that being the familiar doctrine of legal tender. But such a law, as to legal tender, can have no extra-territorial effect, and the mere fact that Germany printed tons of paper which it called marks, and which it declared, as between its subjects, and in Germany, must be taken as equivalent in value to an equal number of gold marks, cannot affect the judgment of this Court in a suit in equity instituted under the provisions of an Act of Congress.

Two other considerations show the futility and injustice of the Alien Property Custodian's contention:

1. Since the date of the judgment in this case, Germany has gone back to an actual gold basis, and the ordinary medium of exchange in its business is gold marks. Is it the Alien Property Custodian's contention, and can such a contention be sustained, that an indebtedness expressed in marks on December 31, 1916, upon which a judgment was entered on July 17, 1923, is payable at the rate of one cent for each 25,000 marks (Record, fol. 67), while if the judgment had been delayed for three or four months judgment would have been entered at the rate of one dollar for each 4.2 marks?

2. At the time of the trial the mark was worth 2/1000 of a cent, and on the date of the decree it was worth 1/25000 of a cent. The Government

openly contends that the delay of the Court in reaching the decision reduces the value of the plaintiffs' claim by 5000%, that is, it makes the plaintiffs' claim worth 1/50 of what it was on the date of trial. Moreover, this action was begun on December 5, 1921 (R. 4), and was brought to trial as quickly as possible, and yet it is common knowledge that in 1921 the German mark, instead of being worth a minute fraction of a cent, was still expressed in terms of cents. The Government contends that the amount to be recovered upon the admitted debt, which was based upon actual value, depends not upon the value involved in the transaction, but upon the state of the court calendars in the district in which the action is instituted by reason of the place of residence of the plaintiffs.

On the one hand, it is possible under the doctrine of the Alien Property Custodian, that by delaying the judgment until after the reform of the German currency the amount to be recovered by an American against a German may be actually *greater* in value than the true value which the debt represents; and on the other hand, it is the result of this contention that delay in reaching a case for trial or in deciding a case (provided that fortune decrees that the delay is not *so* long as to reach the first result) may not only reduce that value, but that the amount of the reduction may vary with the actual period of this uncontrollable delay.

All of this results from the erroneous conception of the Alien Property Custodian in considering that a debt means that the debtor has in his possession specific units of money which the creditor is entitled to recover from him, as if in an action of replevin. It may also be that the Alien Property Custodian erroneously assumes that a legal tender act is extra-territorial in effect.

There are now many authoritative decisions by courts of last resort in this country and in England which refute the contentions of the Alien Property Custodian and sustain the conclusion of the District Judge and the Circuit Court of Appeals. Before citing these authorities and quoting from them nothing remains except a short comment upon the statute under which this suit is brought.

(B)

**The Trading with the Enemy Act.**

Section 9 of the Trading with the Enemy Act (Act of June 5, 1920, ch. 241, 41 Stat. L. 977), so far as material (we have quoted sub-division (a) in full, *supra*, at p. 8), reads as follows:

“(a) That any person not an enemy or ally of enemy \* \* \* to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, may file with the said Custodian a notice of his claim under oath and in such form and containing such particulars as the said Custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled; \* \* \*

If the President shall not so order within sixty days after the filing of such application, or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may at any

time, before the expiration of thirty months after the end of the war institute a suit in equity \* \* \* to establish the \* \* \* debt so claimed, and if so established, the Court shall order the payment, conveyance, transfer, assignment or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or of the interest therein to which the Court shall determine said claimant is entitled:

“(c) \* \* \* nor in any event shall a debt be allowed under this Section unless it was owing to and owned by the claimant prior to October 6, 1917.”

It will be observed that the claimant himself must have been the owner of the debt on October 6th, 1917; and consequently, the debt recoverable under Section 9 of the Trading with the Enemy Act must be a pre-war debt.

Notice of that debt could have been given to the Alien Property Custodian, and its payment ordered by the President upon application therefor, or ordered by the United States District Court upon suit being brought, long before the termination of the war.

X It is respectfully submitted that all implications from these provisions of law favor the allowance of a debt expressed in marks at the pre-war rate of exchange.

In the first place, and most obviously, it is the pre-war debt that can be recovered; and that pre-war debt must necessarily be measured in dollars, because marks could not be paid by the Alien Property Custodian on the order of the President or on the order of the Court.

Secondly, the plain implication of the statute is

that the debt does not vary in amount, certainly not after October 6th, 1917.

We concede, of course, that the statute must be read in the light of co-existing and collateral provisions of law, whether statute law or common law; but in the absence of any statute law or common law requiring a different conclusion, we submit that the correct inference from the provisions of the Trading with the Enemy Act is that the value of pre-war debts recoverable under that Act is to be taken as of their pre-war value; and that any other conclusion would cause confusion and lack of uniformity in the application of its provisions.

We think that it would be not only a misconstruction but a distortion of this statute, under which the suit was brought, to hold that the amount of the debt recoverable thereunder was variable, dependent upon the adventitious date of judgment. Indeed, if that was the construction to be given to the statute it would nullify the portion which permitted the President to order a payment of the debt without a judgment.

The following quotation from an English case, dealing with the rule at common law, is even more applicable, it seems to us, upon the question of statutory construction:

*Lebeaupin v. Crispin* [1920] 2 K. B. 714, by McCARDIE, J., at page 722:

"To hold otherwise would produce extraordinary results. The damages payable would depend partly on the date when the plaintiff issued his writ, partly on the length of the interlocutory proceedings, partly on the illness or good health of the parties as the trial approached, partly on the number of prior cases which occupied the time of the Court, and partly on whether the judge reserved his deci-

sion or not. They might depend also on whether judgment was entered for the plaintiff by the judge of first instance, or by the Court of Appeal or by the House of Lords. Such a state of things would, I think, be most unsatisfactory."

## (C)

*The Authorities at Common Law.*

In view of the fact that courts of last resort in many jurisdictions have now firmly established the rule announced by the District Judge in this case, which avoids the unjust results reached by that for which the Alien Property Custodian contends, it is unnecessary to discuss the divergent earlier authorities, and we shall present to the Court those which have now settled the rule in important jurisdictions of the United States and England.

*United States Courts.*

The question has, we believe, been settled by this Court in the case of *Birge-Forbes Co. v. Heye*, 251 U. S. 317. In order fully to appreciate the opinion rendered by Mr. Justice HOLMES it is necessary to consult the opinion of the Court of Appeals below.

*Birge-Forbes Co. v. Heye*, 248 Fed. 636, by BATTIS, C. J., at page 640:

"One of the assignments raises the question as to whether, in the rendition of a judgment, the German mark should be computed at its normal value, or at the value which it had at the time of the trial; the former being 23.8 cents, and the later 18 $\frac{1}{8}$ cents. The purpose of the judgment is to make whole the plaintiff for the amount which he paid out in discharging the obligations of his principal. The evi-

dence failing to disclose any depreciation of the German mark at the time of this payment, the assumption should be that the value of the mark was at that time the normal value, and the judgment should be predicated upon this value."

The case was taken to this Court by certiorari, and was affirmed (251 U. S. 317), the Court saying by Mr. Justice HOLMES at page 325 (*italics ours*):

"We see no error in the finding that Section 477 of the German Civil Code did not bar the claim. \* \* \* The same is true with regard to the taking the *value of the German mark at par in the absence of evidence that it had depreciated at the time of the plaintiff's payments*. On the whole case our conclusion is that the judgment should be affirmed."

The principle, of course, is the same. Whether the depreciation is from 18 $\frac{1}{4}$  cents per mark to 1/25000 of a cent, or from 23.8 cents to 18 $\frac{1}{8}$  cents makes no difference in the principle to be applied. This Court has ruled, therefore, that the value should be taken as of the date when the debt was due.

Other federal courts of high authority have reached the same conclusion.

*Wormser Bros. v. F. Marroquin & Co.*,  
249 Fed. 428;

*Page v. Lercenson*, 281 Fed. 555;

*Dante v. Miniggio*, 298 Fed. 845.

#### *New York State.*

The Court of Appeals in New York has in unmistakable terms settled the law in that State.

*Hoppe v. Russo-Asiatic Bank*, 235 N. Y. 37, in



which a *Per Curiam* opinion was rendered, as follows:

X / "Held: In an action properly brought in the courts of this state by a citizen or an alien to recover damages, liquidated or unliquidated, for breach of contract, or for a tort, where primarily the plaintiff is entitled to recover a sum expressed in foreign money, in determining the amount of the judgment expressed in our currency the rate of exchange prevailing at the date of the breach of contract or at the date of the commission of the tort is under ordinary circumstances to be applied. (*Gross v. Mendel*, 171 App. Div. 237; *affd.*, 225 N. Y. 633.)"

This is a final settlement of the rule by the Court of Appeals after a consideration of the many New York cases which had previously dealt with the situation. (*Gross v. Mendel*, 171 App. Div. 237, *affd.* 225 N. Y. 633; *Pavenstedt v. N. Y. Life Ins. Co.*, 203 N. Y. 91; *Guaranty Trust Co. v. Meer*, 114 Misc. 327; *Strohmeyer & Arpe Co. v. Guaranty Trust Co.*, 172 App. Div. 16; *Sirie v. Godfrey*, 196 App. Div. 529.)

In the light of the full discussion afforded by the opinions in these various cases dealing with various phases of the rate of exchange problem, the Court of Appeals was able to announce a general rule, thus harmonizing all the decisions and overruling to the extent necessary all expressions of courts of lower jurisdiction inconsistent therewith.

#### *Courts of Last Resort of Other States.*

*Simonoff v. Granite City National Bank*, 279 Ill. 248, by CARTWRIGHT, J., at page 255:

"Presentment having been waived, the plaintiff was entitled to receive at the time of the waiver, in the currency of this country, the

market value of 7700 francs. That amount was then due and he was entitled to recover interest from that date. The value of the 7700 francs in the currency of this country depended on the rate of exchange at the time he became entitled to such value, and he was not required to accept the value of 7700 francs more than a year afterward, when they had depreciated in the markets of this country."

*Katcher v. American Express Company*, 94 N. J. L. 165: In this case a contract between the parties was construed as requiring the defendant to forward a specific number of Russian rubles to a designated payee and to return them to the sender if delivery could not be made. The defendant neither delivered the rubles nor returned them, and an action was brought for damages.

By PARKER, *J.*, at page 171:

"It is plain that under the circumstances of the case plaintiff is entitled to recover in some action the value of 1,000 rubles remaining undelivered in defendant's hands as of the time when, in the usual course and with reasonable diligence, defendant should have ascertained and notified plaintiff that delivery had failed and was impracticable by the course of the mail."

#### *English Cases.*

The House of Lords finally settled the doctrine (which, by the way, had been theretofore expressed with substantial unanimity by the lower courts) in *S. S. Celia v. S. S. Volturno* [1921] 2 A. C. 544, argued before Lords Buckmaster, Sumner, Parmoor, Wrenbury and Carson, a decision concurred in by four of the learned Lords, Lord Carson being

the only one filing a dissenting opinion. We quote from the leading opinion, and from one of the concurring opinions as follows:

By LORD BUCKMASTER at pages 547-549:

+ "There are only two possible dates put forward as the dates upon which the conversion can be made, the date when the loss was incurred and the date when the liability for the loss was determined. The suggestion that it might be the date of the writ was incapable of being supported and has not been argued. For the purpose of determining which of these two periods is correct it is essential to examine what it is that the judgment effects.

"It is argued on behalf of the appellants that it should be considered as divided into two parts, the one declaratory of liability determined in lire and fixed at the date when the damage was incurred, and the other as a matter of mere machinery converting the lire into sterling at the date of the judgment.

"To my mind that is not the true function and purpose of the judgment. A judgment, whether for breach of contract or for tort, where, as in this case, the damage is not continuing, does not proceed by determining what is the sum which, without regarding other circumstances, would at the time of the hearing afford compensation for the loss, but what was the loss actually proved to have been incurred either at the time of the breach or in consequence of the wrong. With regard to an ordinary claim for breach of contract this is plain. Assuming that the breach complained of was the non-delivery of goods according to contract, the measure of damage is the loss sustained at the time of the breach measured by the difference between the contract price and the market price of the goods at that date.

"As was stated by Wright, *J.*, in the case of *Joyner v. Weeks* (1891), 2 Q. B. 31, 33: 'Many

cases may be put in which it is plainly immaterial that at the commencement of an action for a breach of contract the plaintiff is in fact no worse off than he would have been if the contract had been performed.'

"And as an instance of this proposition, he gives the alteration of market values. By the same process of reasoning a person who has committed a breach cannot have his liability increased by such a cause.

"Similar considerations apply to an action for tort. In cases where, as in the present, the damage is fixed and definite, and due to conditions determined at a particular date, the amount of damage is assessed by reference to the then existing circumstances and subsequent changes would not affect the result. If these damages be assessed in a foreign currency the judgment here, which must be expressed in sterling, must be based on the amount required to convert this currency into sterling at the date when the measure was properly made, and the subsequent fluctuation of exchange, one way or the other, ought not to be taken into account."

By LORD PARMOOR at page 561:

"In the case of contract no doubt the parties may agree to make an alteration of exchange subsequent to the breach of contract an element in the assessment of damages, but in the absence of any such agreement, the same considerations would be applicable whether the action is based on tort or on contract".

Counsel for the Alien Property Custodian insist that the case decided by the House of Lords involved the rate of exchange applicable in cases of tort, and not in cases of contract; but the reasoning of the opinions *deduced the rule applicable in cases of tort from the rule deemed applicable in cases of*

*contract*. Whatever slight divergences from this rule may have occurred in the English cases prior to the decision in *S. S. Celia v. Volturno*, *supra*, the decisions made by the English courts subsequent thereto give a uniform application to the rule announced in that case.

*British American Continental Bank, Ltd., in re Goldzicher and Penso's Claim* [1922] 2 Ch. 575, by P. O. LAWRENCE, J., at pp. 581, 583:

"The liquidator contends that as the applicants' claim is one for damages for breach of contract, and as the amount of such damages was fixed once for all when the breach was committed, the correct date for the conversion of the claim from Belgian currency into English currency is the date of the breach. In support of this contention the liquidator relies upon the recent cases of *Di Ferdinando v. Simon* [1920] 2 K. B. 704; *Barry v. Van den Hurk* [1920] 2 K. B. 709; *Beboupen v. Crispin* [1920] 2 K. B. 714; *S. S. 'Celia' (Owners) v. S. S. 'Volturno' (Owners)* [1921] 2 A. C. 544. \* \* \*

"The amount of damages, whenever assessed by this Court (even though for administration purposes that amount is stated to be due on some date other than the date on which the Court makes the actual assessment) must, according to the authorities cited, always be based on the loss sustained at the date of the breach of the contract, and is therefore fixed once for all on that date, which date, therefore, in my judgment, is the correct date on which a claim such as the applicants' ought to be converted into English currency for the purpose of ascertaining the amount for which the applicants ought to be admitted as creditors in a winding-up".

An appeal was taken to the Court of Appeal, and the judgment of the High Court of Justice was

affirmed, WARRINGTON, *L. J.*, saying at [1922] 2 Ch. 587:

“\* \* \* the amount of those damages would have to be ascertained by the application of the rules of law applicable to damages arising from breach of contract. That is now settled by the decision in *S. S. Celia v. S. S. Volturmo* [1921] 2 A. C. 544. It is true that in that case the claim arose in tort and not in contract, but it is quite clear from the speeches delivered by the members of the House of Lords that the rule in contract and in tort is the same. That rule is that, in translating damages from a foreign currency into sterling, the date at which that process has to be effected is the date of the breach of contract”.

*British-American Continental Bank, Ltd., In re: Credit-Generale Liegeois' Claim* [1922] 2 Ch. 589:

The applicants, who were Belgian bankers carrying on business in Brussels, on January 10, 1921, received notice that an English bank with whom they had a current account, had gone into liquidation. They thereupon closed the account and struck a balance showing that the account of the English bank was overdrawn to the extent of 150,396 francs (Belgian currency). On January 25, 1921, an order was made for the compulsory winding up of the English bank. On the claim of the applicants in the winding-up, the question arose whether the amount, which was admittedly due to them, should be calculated, for the purpose of conversion into English currency, at the rate of exchange prevailing on January 10, 1921, when the account was closed, or on January 25, 1921, the date of the winding up order. If the proper date for the conversion was January 25, 1921, the Belgian bank would gain considerably by the difference in the

rate of exchange. *Held*, that the amount of the overdraft, being a debt, ought to be converted into English currency at the date when the debt was incurred, and not at the date of the winding-up order or at the date of the judgment in an action, if one had been brought. The fact that the claim was made in the winding-up, and not by way of an action for debt, made no difference in the application of the foregoing principle.

By P. O. LAWRENCE, *J.*, at page 593:

"In my opinion the question which has arisen falls to be determined in the present proceeding as if this Court were sitting on January 25, 1921, and were then trying an action brought by the applicants against the bank for the recovery of their debt (see *Goldzieher & Penso's Claim* (*Ante*, p. 575)). Therefore, if the correct date for conversion is the date when the debt became due in Belgium, this Court ought now to hold that the amount due from the bank to the applicants on Jan. 25, 1921, is such a sum of English money as is equivalent to 150,396 francs taken at the rate of exchange prevailing on January 10, 1921. If, on the other hand, the correct date for conversion is the date when, for the first time, it became necessary for the applicants or the Court to express the debt in English currency, then this Court ought to hold that the amount due from the bank to the applicants on Jan. 25, 1921, is such a sum of English money as is equivalent to 150,396 francs taken at the rate of exchange prevailing on January 25, 1921, this date, in a winding-up taking the place of a judgment in an action. \* \* \*

"On the assumption that my decision in *Goldzieher and Penso's Claim* (*Ante*, p. 575) is right, I am of opinion that the question which I have to determine is concluded in

the liquidator's favor by authorities which are binding on me. I had arrived at this opinion during the hearing of the case, and held it with some confidence until my attention was drawn to the observations made by Atkin, *L. J.* at the end of his judgment in *Societe des Hotels le Touquet Paris-Plage v. Cumming* [1922], 1 K. B. 451, 465. I confess that those observations have caused me to distrust my opinion, and have raised a suspicion in my mind that there may be some fallacy underlying the conclusions which I have drawn from the authorities. Nevertheless, further reflection and a further study of those authorities have confirmed me in my opinion, the reasons for arriving at which I will now proceed to state. It is now finally settled by the decision in the House of Lords in *S. S. Celia v. S. S. Volturno* [1921], 2 A. C. 544, that in an action brought in England either for breach of contract or for tort, where the damage is fixed and is due to conditions determined at a particular date, but has to be assessed in a foreign country in foreign currency, the date for conversion into English money is the date when the breach or the tort was committed, and not the date when the judgment of the Court was pronounced. The principle affirmed by this decision, in my opinion, applies to an action brought in England for the recovery of a debt payable in a foreign currency, as the amount of the debt, for the purpose of being expressed in the judgment in English money, must be converted into English currency according to the rate of exchange prevailing between the two countries; and this mode of computation, and thus converting the one currency into the other, is based upon damages for the breach of contract to deliver the commodity bargained for (*i. e.*, the foreign currency) at the appointed time and place; consequently the date for conversion is the date of breach and not the date of the



judgment; see the judgment of Vaughan Williams, *L. J.* in *Manners v. Pearson & Son* [1898], 1 Ch. 581, 592. This view of the learned Lord Justice was based to a large extent upon the decision in *Scott v. Bevan*, 2 B. & Ad. 78, which has been so fully commented upon recently in the Court of Appeal in *Di Ferdinando v. Simon* [1920], 2 K. B. 704 [1920], 3 K. B. 409, that I need not say more about it here than that there the plaintiff was seeking to recover in an English Court a judgment debt payable to him in the Island of Jamaica in the currency of that island, and that it was held that the date for conversion was the date of the judgment in Jamaica."

The following are notes published in the English weekly law journals of two cases on the question of the rate of exchange in fixing damages.

*Uliendahl v. Pankhurst Wright & Co.*, K. B. Div., July 6, 1923, 39 Times L. R., 628; 67 S. J. 791; 1923 W. N. 224. This action, brought by a German to recover price of goods sold and delivered to defendant in England, raised a question as to the date at which exchange should be calculated in case of non-payment by the purchasers. Action was brought for 76,885.25 marks. Defense failed and judgment was given for the plaintiff. The question then arose at what rate of exchange 76,885.25 marks should be converted into sterling.

ROWLATT, *J.*, at page 628,

"felt that the weight of authority was clearly in favour of the view that the rate of exchange to be taken was that prevailing when the debt became payable, and not that prevailing when the action was tried. The judgment of Mr. Justice Acton in *Cohn v. Boulken* (*supra*, 36 T. L. R. 767) appeared to be based on a miscon-

ception of the effect of *Scott v. Bevan* (2 B. & Ad. 78) and was, he thought, erroneous. In actual practice, the theory that the rate of exchange prevailing at the date of the judgment was that which must be taken would lead to great inconvenience. Clearly it was not so in a case of tort or of damages for breach of contract, and he did not see why it should be so in a case of debt. It would be most inconvenient if not only the dilatoriness of the parties in getting their action tried, but the accidents of the state of business in the Courts should affect the rate of exchange. He would point out that the phrase 'the rate prevailing at the date of the judgment' should really be 'the rate prevailing at the date of the verdict'; to-day verdict and judgment usually come together, but in the old practice judgment did not come until the first day of the term following that in which a verdict was obtained, and it was the verdict that was the important matter. There must be judgment at the rate of exchange prevailing when the debt became due—namely, for £313."

*Peyrae v. Wilkinson and another*, K. B. Div., Oct. 26, 1923, 156 Law Times 341: Action tried before BAILHACHE, J., sitting without a jury. The plaintiff, who carried on business at Lyons, France, brought an action against the defendants to recover the balance of the price of goods sold and delivered by him to the defendants. The agreement for the sale of the goods was made in October, 1921, and the price specified was 10,630 francs subject to certain allowances. The learned judge held that the goods ought to have been paid for on the 10th December, 1921. The defendants paid on account £50 on the 7th April, 1922, an amount which represented, at the rate of 48 francs to a pound, 2,400 francs. The present action was brought to recover

the balance, viz., 8,017 francs. The question for decision was whether, in converting that sum into English currency, the rate of exchange current when payment should have been made for the goods, namely, the 10th December, 1921, should prevail, or whether the rate of exchange should be taken as at the date of the judgment. The value of the franc had depreciated considerably between those dates.

Held, that the debt must be converted at the rate of exchange current at the date the debt became due and payable.

(D)

**The Effect of the Treaty Provisions.**

If it should be held that under the common law plaintiffs' right would be limited to recovery of the value of the marks on the date of judgment, then, we submit, it is entirely clear that a new right in plaintiffs' favor was created by the Treaty of Peace between the United States and Germany, entitling plaintiffs to recover these marks at the average rate prevailing for one month prior to the declaration of war, which is at the rate of 17½ cents per mark (Record, p. 9), and which is no less than the amount of the judgment actually rendered.

In connection with the discussion of the right to recover interest for the period of the war upon a claim which is to be paid by the Alien Property Custodian out of funds of a German seized by him, we have quoted the sections of the Treaty of Peace with Germany, and of the Treaty of Versailles which demonstrate, we submit, that in such actions interest is to be allowed, and payment is to be made *in a currency at a rate of exchange* as specified in the Treaty of Versailles. We need not repeat the

argument or the citation of the sections of the Treaties which support it. We shall quote only the section of the Treaty of Versailles which deals with the question of the currency and rate of exchange (Subdivision (*d*) of Article 296 in Section III of Part X—italics ours) :

“(d) Debts shall be paid or credited in the currency of such one of the Allied or Associated Powers, their colonies or protectorates, or the British Dominions or India, as may be concerned. *If the debts are payable in some other currency they shall be paid or credited in the currency of the country concerned, whether an Allied or Associated Power, Colony, Protectorate, British Dominion or India, at the pre-war rate of exchange.*

“For the purpose of this provision the pre-war rate of exchange shall be defined as the average cable transfer rate prevailing in the Allied or Associated country concerned during the month immediately preceding the outbreak of war between the said country concerned and Germany.”

### **Conclusion.**

The Decrees of the District Court and of the Circuit Court of Appeals, in so far as they failed to allow interest on the claim from April 6, 1917, to April 14, 1919, should be reversed, and in all other respects should be affirmed.

Respectfully submitted,

ALEXANDER B. SIEGEL,  
Attorney for Benjamin Guinness *et al.*

not be guaranteed by the States of which those territories form part;

(c) The sums due to the nationals of one of the High Contracting Parties by the nationals of an Opposing State will be debited to the Clearing Office of the country of the debtor, and paid to the creditor by the Clearing Office of the country of the creditor;

(d) Debts shall be paid or credited in the currency of such one of the Allied and Associated Powers, their colonies or protectorates, or the British Dominions or India, as may be concerned. If the debts are payable in some other currency they shall be paid or credited in the currency of the country concerned, whether an Allied or Associated Power, Colony, Protectorate, British Dominion, or India, at the pre-war rate of exchange.

For the purpose of this provision the pre-war rate of exchange shall be defined as the average cable transfer rate prevailing in the Allied or Associated country concerned during the month immediately preceding the outbreak of war between the said country concerned and Germany.

If a contract provides for a fixed rate of exchange governing the conversion of the currency in which the debt is stated into the currency of the Allied or Associated country concerned, then the above provisions concerning the rate of exchange shall not apply.

In the case of new States the currency in which and the rate of exchange at which debts shall be paid or credited shall be determined by the Reparation Commission provided for in Part VIII (Reparation);

(e) The provisions of this Article and of the Annex hereto shall not apply as between Germany on the one hand and any one of the Allied and Associated Powers, their colonies or protectorates, or any one of the British Dominions or India on the other hand, unless within a period of one month from the deposit of the ratification of the present Treaty by the Power in question, or of the ratification on behalf of such Dominion or of India, notice to that effect is given to Germany by the Government of such Allied or Associated Power or of such Dominion or of India as the case may be;

(f) The Allied and Associated Powers who have adopted this Article and the Annex hereto may agree between themselves to apply them to their respective nationals established in their territory so far as regards matters between their nationals and German nationals. In this case the payments made by application of this provision will be subject to arrangements between the Allied and Associated Clearing Offices concerned.

## ANNEX.

### 1.

Each of the High Contracting Parties will, within three months from the notification provided for in Article 296, paragraph (e), establish a Clearing Office for the collection and payment of enemy debts.

Local Clearing Offices may be established for any particular portion of the territories of the High Contracting Parties. Such local Clearing Offices may perform all the functions of a central Clearing

Office in their respective districts, except that all transactions with the Clearing Office in the Opposing State must be effected through the central Clearing Office.

## 2.

In this Annex the pecuniary obligations referred to in the first paragraph of Article 296 are described "as enemy debts," the persons from whom the same are due as "enemy debtors," the persons to whom they are due as "enemy creditors," the Clearing Office in the country of the creditor is called the "Creditor Clearing Office," and the Clearing Office in the country of the debtor is called the "Debtor Clearing Office."

## 3.

The High Contracting Parties will subject contraventions of paragraph (a) of Article 296 to the same penalties as are at present provided by their legislation for trading with the enemy. They will similarly prohibit within their territory all legal process relating to payment of enemy debts, except in accordance with the provisions of this Annex.

## 4.

The Government guarantee specified in paragraph (b) of Article 296 shall take effect whenever, for any reason, a debt shall not be recoverable, except in a case where at the date of the outbreak of war the debt was barred by the laws of prescription in force in the country of the debtor, or where the debtor was at that time in a state of bankruptcy or failure or had given formal indication

of insolvency, or where the debt was due by a company whose business has been liquidated under emergency legislation during the war. In such case the procedure specified by this Annex shall apply to payment of the dividends.

The terms "bankruptcy" and "failure" refer to the application of legislation providing for such juridical conditions. The expression "formal indication of insolvency" bears the same meaning as it has in English law.

## 5.

Creditors shall give notice to the Creditor Clearing Office within six months of its establishment of debts due to them, and shall furnish the Clearing Office with any documents and information required of them.

The High Contracting Parties will take all suitable measures to trace and punish collusion between enemy creditors and debtors. The Clearing Offices will communicate to one another any evidence and information which might help the discovery and punishment of such collusion.

The High Contracting Parties will facilitate as much as possible postal and telegraphic communication at the expense of the parties concerned and through the intervention of the Clearing Offices between debtors and creditors desirous of coming to an agreement as to the amount of their debt.

The Creditor Clearing Office will notify the Debtor Clearing Office of all debts declared to it. The Debtor Clearing Office will, in due course, inform the Creditor Clearing Office which debts are admitted and which debts are contested. In the latter case, the Debtor Clearing Office will give the grounds for the nonadmission of debt.



## 6.

When a debt has been admitted, in whole or in part, the Debtor Clearing Office will at once credit the Creditor Clearing Office with the amount admitted, and at the same time notify it of such credit.

## 7.

The debt shall be deemed to be admitted in full and shall be credited forthwith to the Creditor Clearing Office unless within three months from the receipt of the notification or such longer time as may be agreed to by the Creditor Clearing Office notice has been given by the Debtor Clearing Office that it is not admitted.

## 8.

When the whole or part of a debt is not admitted the two Clearing Offices will examine into the matter jointly and will endeavour to bring the parties to an agreement.

## 9.

The Creditor Clearing Office will pay to the individual creditor the sums credited to it out of the funds placed at its disposal by the Government of its country and in accordance with the conditions fixed by the said Government, retaining any sums considered necessary to cover risks, expenses, or commissions.

## 10.

Any person having claimed payment of an enemy debt which is not admitted in whole or in part shall pay to the Clearing Office, by way of fine, in-

terest at 5 per cent on the part not admitted. Any person having unduly refused to admit the whole or part of a debt claimed from him shall pay, by way of fine, interest at 5 per cent on the amount with regard to which his refusal shall be disallowed.

Such interest shall run from the date of expiration of the period provided for in paragraph 7 until the date on which the claim shall have been disallowed or the debt paid.

Each Clearing Office shall, in so far as it is concerned, take steps to collect the fines above provided for, and will be responsible if such fines can not be collected.

The fines will be credited to the other Clearing Office, which shall retain them as a contribution towards the cost of carrying out the present provisions.

#### 11.

The balance between the Clearing Offices shall be struck monthly and the credit balance paid in cash by the debtor State within a week.

Nevertheless, any credit balances which may be due by one or more of the allied and Associated Powers shall be retained until complete payment shall have been effected of the sums due to the Allied or Associated Powers or their nationals on account of the war.

#### 12.

To facilitate discussion between the Clearing Offices each of them shall have a representative at the place where the other is established.

#### 13.

Except for special reasons all discussions in regard to claims will, so far as possible, take place at the Debtor Clearing Office.

## 14.

In conformity with Article 296, paragraph (b), the High Contracting Parties are responsible for the payment of the enemy debts owing by their nationals.

The Debtor Clearing Office will therefore credit the Creditor Clearing Office with all debts admitted, even in case of inability to collect them from the individual debtor. The Governments concerned will, nevertheless, invest their respective Clearing Offices with all necessary powers for the recovery of debts which have been admitted.

As an exception, the admitted debts owing by persons having suffered injury from acts of war shall only be credited to the Creditor Clearing Office when the compensation due to the person concerned in respect of such injury shall have been paid.

## 15.

Each Government will defray the expenses of the Clearing Office set up in its territory, including the salaries of the staff.

## 16.

Where the two Clearing Offices are unable to agree whether a debt claimed is due, or in case of a difference between an enemy debtor and an enemy creditor or between the Clearing Offices, the dispute shall either be referred to arbitration if the parties so agree under conditions fixed by agreement between them, or referred to the Mixed Arbitral Tribunal provided for in Section VI hereafter.

At the request of the Creditor Clearing Office the dispute may, however, be submitted to the jurisdiction of the Courts of the place of domicile of the debtor.

## 17.

Recovery of sums found by the Mixed Arbitral Tribunal, the Court, or the Arbitration Tribunal to be due shall be effected through the Clearing Offices as if these sums were debts admitted by the Debtor Clearing Office.

## 18.

Each of the Governments concerned shall appoint an agent who will be responsible for the presentation to the Mixed Arbitral Tribunal of the cases conducted on behalf of its Clearing Office. This agent will exercise a general control over the representatives or counsel employed by its nationals.

Decisions will be arrived at on documentary evidence, but it will be open to the Tribunal to hear the parties in person, or according to their preference by their representatives approved by the two Governments, or by the agent referred to above, who shall be competent to intervene along with the party or to reopen and maintain a claim abandoned by the same.

## 19.

The Clearing Offices concerned will lay before the Mixed Arbitral Tribunal all the information and documents in their possession, so as to enable

the Tribunal to decide rapidly on the cases which are brought before it.

## 20.

Where one of the parties concerned appeals against the joint decision of the two Clearing Offices he shall make a deposit against the costs, which deposit shall only be refunded when the first judgment is modified in favour of the appellant and in proportion to the success he may attain, his opponent in case of such a refund being required to pay an equivalent proportion of the costs and expenses. Security accepted by the Tribunal may be substituted for a deposit.

A fee of 5 per cent of the amount in dispute shall be charged in respect of all cases brought before the Tribunal. This fee shall, unless the Tribunal directs otherwise, be borne by the unsuccessful party. Such fee shall be added to the deposit referred to. It is also independent of the security.

The Tribunal may award to one of the parties a sum in respect of the expenses of the proceedings.

Any sum payable under this paragraph shall be credited to the Clearing Office of the successful party as a separate item.

## 21.

With a view to the rapid settlement of claims, due regard shall be paid in the appointment of all persons connected with the Clearing Offices or with the Mixed Arbitral Tribunal to their knowledge of the language of the other country concerned.

Each of the Clearing Offices will be at liberty to correspond with the other and to forward documents in its own language.

## 22.

Subject to any special agreement to the contrary between the Governments concerned, debts shall carry interest in accordance with the following provisions:

Interest shall not be payable on sums of money due by way of dividend, interest, or other periodical payments which themselves represent interest on capital.

The rate of interest shall be 5 per cent per annum except in cases where, by contract, law, or custom, the creditor is entitled to payment of interest at a different rate. In such cases the rate to which he is entitled shall prevail.

Interest shall run from the date of commencement of hostilities (or, if the sum of money to be recovered fell due during the war, from the date at which it fell due) until the sum is credited to the Clearing Office of the creditor.

Sums due by way of interest shall be treated as debts admitted by the Clearing Offices and shall be credited to the Creditor Clearing Office in the same way as such debts.

## 23.

Where by decision of the Clearing Offices or the Mixed Arbitral Tribunal a claim is held not to fall within Article 296, the creditor shall be at liberty to prosecute the claim before the Courts or to take such other proceedings as may be open to him.

The presentation of a claim to the Clearing Office suspends the operation of any period of prescription.

## 24.

The High Contracting Parties agree to regard the decisions of the Mixed Arbitral Tribunal as final and conclusive, and to render them binding upon their nationals.

## 25.

In any case where a Creditor Clearing Office declines to notify a claim to the Debtor Clearing Office, or to take any step provided for in this Annex, intended to make effective in whole or in part a request of which it has received due notice, the enemy creditor shall be entitled to receive from the Clearing Office a certificate setting out the amount of the claim, and shall then be entitled to prosecute the claim before the courts or to take such other proceedings as may be open to him.

## SECTION IV.

## PROPERTY, RIGHTS, AND INTERESTS.

## ARTICLE 297.

The question of private property, rights, and interests in an enemy country shall be settled according to the principles laid down in this Section and to the provisions of the Annex hereto.

(a) The exceptional war measures and measures of transfer (defined in paragraph 3 of the Annex hereto) taken by Germany with respect to the property, rights, and interests of nationals of Allied or Associated Powers, including companies and associations in which they are interested, when liquidation has not been completed, shall be immediately discontinued or stayed and the property, rights,

and interests concerned restored to their owners, who shall enjoy full rights therein in accordance with the provisions of Article 298.

(b) Subject to any contrary stipulations which may be provided for in the present Treaty, the Allied and Associated Powers reserve the right to retain and liquidate all property, rights, and interests belonging at the date of the coming into force of the present Treaty to German nationals, or companies controlled by them, within their territories, colonies, possessions, and protectorates, including territories ceded to them by the present Treaty.

The liquidation shall be carried out in accordance with the laws of the Allied or Associated State concerned, and the German owner shall not be able to dispose of such property, rights, or interests nor to subject them to any charge without the consent of that State.

German nationals who acquire *ipso facto* the nationality of an Allied or Associated Power in accordance with the provisions of the present Treaty will not be considered as German nationals within the meaning of this paragraph.

(c) The price or the amount of compensation in respect of the exercise of the right referred to in the preceding paragraph (b) will be fixed in accordance with the methods of sale or valuation adopted by the laws of the country in which the property has been retained or liquidated.

(d) As between the Allied and Associated Powers or their nationals on the one hand and Germany or her nationals on the other hand, all the exceptional war measures, or measures of transfer, or acts done or to be done in execution of such measures as defined in paragraphs 1 and 3 of the An-



nex hereto shall be considered as final and binding upon all persons except as regards the reservations laid down in the present Treaty.

(c) The nationals of Allied and Associated Powers shall be entitled to compensation in respect of damage or injury inflicted upon their property, rights or interests, including any company or association in which they are interested, in German territory as it existed on August 1, 1914, by the application either of the exceptional war measures or measures of transfer mentioned in paragraphs 1 and 3 of the Annex hereto. The claims made in this respect by such nationals shall be investigated, and the total of the compensation shall be determined by the Mixed Arbitral Tribunal provided for in Section VI or by an Arbitrator appointed by that Tribunal. This compensation shall be borne by Germany, and may be charged upon the property of German nationals within the territory or under the control of the claimant's State. This property may be constituted as a pledge for enemy liabilities under the conditions fixed by paragraph 4 of the Annex hereto. The payment of this compensation may be made by the Allied or Associated State, and the amount will be debited to Germany.

(f) Whenever a national of an Allied or Associated Power is entitled to property which has been subjected to a measure of transfer in German territory and expresses a desire for its restitution, his claim for compensation in accordance with paragraph (c) shall be satisfied by the restitution of the said property if it still exists in specie.

In such case Germany shall take all necessary steps to restore the evicted owner to the possession of his property, free from all encumbrances or bur-

dens with which it may have been charged after the liquidation, and to indemnify all third parties injured by the restitution.

If the restitution provided for in this paragraph can not be effected, private agreements arranged by the intermediation of the Powers concerned or the Clearing Offices provided for in the Annex to Section III may be made, in order to secure that the national of the Allied or Associated Power may secure compensation for the injury referred to in paragraph (e) by the grant of advantages or equivalents which he agrees to accept in place of the property, rights, or interests of which he was deprived.

Through restitution in accordance with this Article the price or the amount of compensation fixed by the application of paragraph (e) will be reduced by the actual value of the property restored, account being taken of compensation in respect of loss of use or deterioration.

(g) The rights conferred by paragraph (f) are reserved to owners who are nationals of Allied or Associated Powers within whose territory legislative measures prescribing the general liquidation of enemy property, rights, or interests were not applied before the signature of the Armistice.

(h) Except in cases where, by application of paragraph (f), restitutions in specie have been made, the net proceeds of sales of enemy property, rights, or interests, wherever situated, carried out either by virtue of war legislation or by application of this Article, and in general all cash assets of enemies, shall be dealt with as follows:

(1) As regards Powers adopting Section III and the Annex thereto, the said proceeds and cash

assets shall be credited to the Power of which the owner is a national, through the Clearing Office established thereunder; any credit balance in favor of Germany resulting therefrom shall be dealt with as provided in Article 243.

(2) As regards Powers not adopting Section III and the Annex thereto, the proceeds of the property, rights, and interests, and the cash assets, of the nationals of Allied or Associated Powers held by Germany shall be paid immediately to the person entitled thereto or to his Government; the proceeds of the property, rights, and interests, and the cash assets, of German nationals received by an Allied or Associated Power shall be subject to disposal by such Power in accordance with its laws and regulations and may be applied in payment of the claims and debts defined by this Article or paragraph 4 of the Annex hereto. Any property, rights, and interests or proceeds thereof or cash assets not used as above provided may be retained by the said Allied or Associated Power and if retained the cash value thereof shall be dealt with as provided in Article 243.

In the case of liquidations effected in new States, which are signatories of the present Treaty as Allied and Associated Powers, or in States which are not entitled to share in the reparation payments to be made by Germany, the proceeds of liquidations effected by such States shall, subject to the rights of the Reparation Commission under the Present Treaty, particularly under Articles 235 and 260, be paid direct to the owner. If on the application of that owner, the Mixed Arbitral Tribunal provided for by Section VI of this Part or an arbitrator appointed by that Tribunal, is satisfied that the conditions of the sale or measures

taken by the Government of the State in question outside its general legislation were unfairly prejudicial to the price obtained, they shall have discretion to award to the owner equitable compensation to be paid by that State.

(i) Germany undertakes to compensate her nationals in respect of the sale or retention of their property, rights, or interests in Allied or Associated States.

(j) The amount of all taxes and imposts upon capital levied or to be levied by Germany on the property, rights, and interests of the nationals of the Allied or Associated Powers from November 11, 1918, until three months from the coming into force of the present Treaty, or, in the case of property, rights, or interests which have been subjected to exceptional measures of war, until restitution in accordance with the present Treaty, shall be restored to the owners.

#### ARTICLE 298.

Germany undertakes, with regard to the property, rights, and interests, including companies and associations in which they were interested, restored to nationals of Allied and Associated Powers in accordance with the provisions of Article 297, paragraph (a) or (f) :

(a) to restore and maintain, except as expressly provided in the present Treaty, the property, rights, and interests of the nationals of Allied or Associated Powers in the legal position obtaining in respect of the property, rights, and interests of German nationals under the laws in force before the war;

## 3.

In Article 297 and this Annex the expression "exceptional war measures" includes measures of all kinds, legislative, administrative, judicial or others, that have been taken or will be taken hereafter with regard to enemy property, and which have had or will have the effect of removing from the proprietors the power of disposition over their property, though without affecting the ownership, such as measures of supervision, of compulsory administration, and of sequestration; or measures which have had or will have as an object the seizure of, the use of, or the interference with enemy assets, for whatsoever motive, under whatsoever form or in whatsoever place. Acts in the execution of these measures include all detentions, instructions, orders, or decrees of Government departments or courts applying these measures to enemy property, as well as acts performed by any person connected with the administration or the supervision of enemy property, such as the payment of debts, the collecting of credits, the payment of any costs, charges, or expenses, or the collecting of fees.

Measures of transfer are those which have affected or will affect the ownership of enemy property by transferring it in whole or in part to a person other than the enemy owner, and without his consent, such as measures directing the sale, liquidation, or devolution of ownership in enemy property, or the cancelling of titles or securities.

## 4.

All property, rights, and interests of German nationals within the territory of any Allied or Associated Power and the net proceeds of their sale, liquidation, or other dealing therewith may

be charged by that Allied or Associated Power in the first place with payment of amounts due in respect of claims by the nationals of that Allied or Associated Power with regard to their property, rights, and interests, including companies and associations in which they are interested, in German territory, or debts owing to them by German nationals, and with payment of claims growing out of acts committed by the German Government or by any German authorities since July 31, 1914, and before that Allied or Associated Power entered into the war. The amount of such claims may be assessed by an arbitrator appointed by Mr. Gustave Ador, if he is willing, or if no such appointment is made by him, by an arbitrator appointed by the Mixed Arbitral Tribunal provided for in Section VI. They may be charged in the second place with payment of the amounts due in respect of claims by the nationals of such Allied or Associated Power with regard to their property, rights, and interests in the territory of other enemy Powers, in so far as those claims are otherwise unsatisfied.

## 5.

Notwithstanding the provisions of Article 297, where immediately before the outbreak of war a company incorporated in an Allied or Associated State had rights in common with a company controlled by it and incorporated in Germany to the use of trade-marks in third countries, or enjoyed the use in common with such company of unique means of reproduction of goods or articles for sale in third countries, the former company shall alone have the right to use these trade-marks in third countries to the exclusion of the German company, and these unique means of reproduction shall be

belonging to the Allied or Associated Powers or to their component States, Provinces, or Municipalities.

## 12.

All investments wheresoever effected with the cash assets of nationals of the High Contracting Parties, including companies and associations in which such nationals were interested, by persons responsible for the administration of enemy properties or having control over such administration, or by order of such persons or of any authority whatsoever shall be annulled. These cash assets shall be accounted for irrespective of any such investment.

## 13.

Within one month from the coming into force of the present Treaty, or on demand at any time, Germany will deliver to the Allied and Associated Powers all accounts, vouchers, records, documents, and information of any kind which may be within German territory, and which concern the property, rights, and interests of the nationals of those Powers, including companies and associations in which they are interested, that have been subjected to an exceptional war measure, or to a measure of transfer either in German territory or in territory occupied by Germany or her allies.

The controllers, supervisors, managers, administrators, sequestrators, liquidators, and receivers shall be personally responsible under guarantee of the German Government for the immediate delivery in full of these accounts and documents, and for their accuracy.

## 14.

The provisions of Article 297 and this Annex relating to property, rights, and interests in an enemy country, and the proceeds of the liquidation thereof, apply to debts, credits, and accounts, Section III regulating only the method of payment.

In the settlement of matters provided for in Article 297 between Germany and the Allied or Associated States, their colonies or protectorates, or any one of the British Dominions or India, in respect of any of which a declaration shall not have been made that they adopt Section III, and between their respective nationals, the provisions of Section III respecting the currency in which payment is to be made and the rate of exchange and of interest shall apply unless the Government of the Allied or Associated Power concerned shall within six months of the coming into force of the present Treaty notify Germany that the said provisions are not to be applied.

## 15.

The provisions of Article 297 and this Annex apply to industrial, literary, and artistic property which has been or will be dealt with in the liquidation of property, rights, interests, companies, or businesses under war legislation by the Allied or Associated Powers, or in accordance with the stipulations of Article 297, paragraph (b).



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# Supreme Court of the United States

OCTOBER TERM, 1925, No. 80.

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FREDERICK C. HICKS, as Alien Property Custodian, and  
FRANK WHITE, as Treasurer of the United States,  
*Petitioners,*

*v.*

BENJAMIN GUINNESS *et al.*,  
*Respondents.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE SECOND CIRCUIT.

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BRIEF OF AMICI CURIAE.

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WILLIAM D. GUTHRIE,  
LEWIS R. CONKLIN,  
ISIDOR J. KRESEL,  
BERNARD HERSHKOPF,  
*Amici Curiae.*



## I N D E X .

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	PAGE
Introductory statement .....	1
I. The rate of exchange prevalent on the day of the breach is the proper measure of damage.....	2
II. The pre-war date is plainly the date contemplated by the Trading with the Enemy Act as the proper time for converting mark indebtedness into money of the United States in cases under said act.....	9
III. Whatever might otherwise be the correct rule of law in peace, the war conditions require the rejection of the Government's contention....	10
Conclusion .....	13

### LIST OF CASES.

Barry <i>v.</i> Van Den Hurk, [1920] 2 K. B. 709.....	4, 6
Dante <i>v.</i> Miniggio, 298 Fed. 845.....	6
Di Ferdinando <i>v.</i> Simon, [1920] 3 K. B. 409.....	6
Effinger <i>v.</i> Kenney, 115 U. S. 566.....	12
Gross <i>v.</i> Mendel, 225 N. Y. 633.....	6
Grunwald <i>v.</i> Freese, 34 Pac. 73 (Cal.).....	6
Guinness <i>v.</i> Miller, 299 Fed. 538; 291 Fed. 769.....	1, 6, 8, 10
<i>In re</i> British American Continental Bk., [1922] 2 Ch. 575 and 589.....	6
Katcher <i>v.</i> American Exp. Co., 94 N. J. L. 165.....	6
Lebeaupin <i>v.</i> Crispin, [1920] 2 K. B. 714.....	4, 6
Page <i>v.</i> Levenson, 281 Fed. 555.....	5, 6, 12

	PAGE
<i>Pavenstedt v. N. Y. L. Ins. Co.</i> , 203 N. Y. 91.....	6
<i>Peyrae v. Wilkinson</i> , (1923) 156 Law Times 341.....	6
<i>Simonoff v. Granite City Nat. Bk.</i> , 279 Ill. 248.....	6
<i>Société des Hotels du Touquet-Paris-Plage v. Cum- ming</i> , [1921] 3 K. B. 459.....	6
<i>S. S. Celia v. S. S. Volturmo</i> , [1921] 2 App. Cas. 544..	5, 6
<i>Uliendahl v. Pankhurst, Wright &amp; Co.</i> , (1923) 39 Times Law Rep. 628.....	6
<i>Wichita Mill &amp; E. Co. v. Namlooze, etc. Industrie</i> , 3 F. (2nd) 931.....	6
<i>Wormser Bros. v. F. Marrouquin &amp; Co.</i> , 249 Fed. 428	6

#### STATUTE AND TREATY.

<i>Trading with the Enemy Act</i> , sec. 9.....	1, 9
<i>Versailles Treaty of Peace</i> , part X, sec. III, art. 296, subd. d .....	10

#### PERIODICAL

<i>Weekly Law Review</i> , No. 10, Leipszig, May 15, 1923, pp. 451, 459.....	7
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# Supreme Court of the United States

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BENJAMIN GUINNESS, *et al.*,  
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---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT.

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## BRIEF OF *AMICI CURIAE*.

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In the above entitled cause, reported below *sub nomine Guinness v. Miller*, 299 Fed. 538, the Circuit Court of Appeals held that a pre-war indebtedness in German marks, due to an American from a German whose property had been seized by the Alien Property Custodian, was to be allowed to the American, under section 9 of the Trading with the Enemy Act, at the rate of exchange which prevailed on the day when the indebtedness was due and the German debtor failed to pay, that is, at the rate of exchange on the day of the breach. In making that ruling, the court

below rejected the Government's contention that the rate of exchange obtaining on the day of judgment should have been taken instead.

The undersigned are interested in the question referred to, as counsel for an American creditor somewhat similarly situated, and pray leave to file this brief in support mainly of the position urged by the respondents in the case at bar.

## I.

THE RATE OF EXCHANGE PREVALENT ON THE DAY OF THE BREACH IS THE PROPER MEASURE OF DAMAGE.

The case at bar, and the case in which the undersigned are interested, concern a past due pre-war mark indebtedness of a German who failed to pay the same when it became due. We shall, therefore, deal only with that species of controversy, although it is our opinion that the same rule of damages should obtain, with respect to the point herein involved, in both tort and contract cases.

The fundamental purpose of the law in awarding damages is manifestly to make the plaintiff whole for the injury suffered by him. That injury occurs, in the case of a debt, when the money due is not paid on the due date. It should, therefore, obviously follow that then and there arises the plaintiff's right to compensation. If it were possible for the law to act forthwith, it would, in justice, at once and at that time, require payment of the indebtedness to the creditor. In that way he would have his due and no more.

But, of course, it is not practicable for the courts to accomplish their purposes of justice with any such celerity.

Hence, it is submitted, that they should, despite the inevitable delay attributable to the machinery of the law and fortuitous causes, so mould their processes and so shape their rules as to effectuate substantially the same result; in other words, they should do justice, in the end, as of the time when, under the ideal conditions, it would have been done, namely, as of the very day of the defendant's wrong or breach. In that manner, the plaintiff is awarded indemnity and the defendant made to pay only what he should have paid. In that manner, the right of the plaintiff and the liability of the defendant are both clear and known from the very accrual of the cause of action, are reasonably certain, and are automatically fixed by an external standard over which neither party ordinarily has or can have any control. In brief, we have then a clear, simple and uniform rule, with which neither plaintiff nor defendant can speculate, and which is consonant with substantial justice in the great majority of cases.

In our opinion, the foregoing simple considerations dispose of the question in the case at bar. If it be just to grant the plaintiff what he would have had on the day fixed for performance, then in the case of a German mark indebtedness, he should at least have the marks that were then due. But courts in the United States give relief only in dollars; and, furthermore, they know that foreign money fluctuates; that the German mark of one year may, in reality, be a totally different thing, for all practical purposes, from the mark of another year, and hence that justice and common sense are not and cannot be served merely by awarding the equivalent in dollars of the number of marks due, at the rate of exchange existing on *any* date. Some date must, therefore, be selected; and, if indemnification of the plain-

tiff is to be accomplished by our courts, that date should be the date when the foreign money was due and should have been paid, namely, the breach date. If our courts could have been invoked on that day and the defendant then immediately cast in judgment, the dollar value of the mark on that day would manifestly have been awarded, and thus substantial justice accomplished. The mere fact that the mill of the law grinds exceedingly slow should make no difference. Its aim must still be to do the same measure of justice, to make the plaintiff whole; and, consequently, he should have on the day of judgment, whenever that is actually arrived at, the same amount as if the courts could have instantly brought the defendant to book—he should have the precise equivalent of performance, viz., the dollar equivalent of the foreign money at the rate of exchange on the day of breach. As stated in an analogous case (*Barry v. Van Den Hurk*, [1920] 2 K. B. 709, 712):

“The plaintiff, whether he be buyer or seller, may issue his writ immediately the breach of contract takes place; the damages are then crystallized, and they do not change afterwards.”

The law is indisputably a practical and common sense institution. It should not therefore commit itself to rules which involve absurdity and injustice and make its results depend largely upon chance or fortuitous circumstances. Such consequences are, however, inevitable under the Government's contention that the rate of exchange prevailing on the day of judgment should be applied. Mr. Justice McCardie pointed that out in *Lebeaupin v. Crispin*, [1920] 2 K. B. 714, 722, where, referring to the argument now pressed by the Government, he declared:

“The damages payable would [under that theory] depend partly on the date when the plaintiff issued



his writ, partly on the length of the interlocutory proceedings, partly on the illness or good health of the parties as the trial approached, partly on the number of prior cases which occupied the time of the court, and partly on whether the judge reserved his decision or not. They might depend also on whether judgment was entered for the plaintiff by the judge of first instance, or by the Court of Appeal or by the House of Lords. Such a state of things would, I think, be most unsatisfactory."

The House of Lords took the same view in the case of the *S. S. Celia*, [1921] 2 App. Cas. 544, 558, where it was said that—

"Waiting to convert the currency till the date of judgment only adds the uncertainty of exchange to the uncertainty of the law's delays."

See also *Page v. Levenson*, 281 Fed. 555, 558-9.

With all deference, it should also be observed that the Government's contention, if adopted as law, would have a demoralizing influence upon both litigants and lawyers. It would offer litigant and counsel a premium to hasten or delay the trial according to their notions about the money market. Thus, if there were a steadily rising rate of exchange, the plaintiff would find it to his interest to delay commencing suit, and to delay trial after suit were begun, in order to secure judgment at the time when the rate was the highest. In that case he would be speculating in foreign exchange at the defendant's expense. Likewise if there were a steady falling market, it would be to the advantage of the defendant and his attorney to delay the day of judgment as long as possible. There would then be a resort to dilatory tactics, and a gambling in foreign exchange by the defendant at the plaintiff's expense. It is clear that

if the Government's contention should prevail, it would add new unwholesome elements and influences in the practical administration of justice.

The rule now urged upon the court by the undersigned is sanctioned by the weight of authority and the best considered recent cases. *Wormser Bros. v. F. Marrouquin & Co.*, 249 Fed. 428, 430 (C. C. A., 5th Cir.); *Page v. Levenson*, *supra* (D. C. Md.); *Guinness v. Miller*, 291 Fed. 769 (S. D. N. Y.), affirmed, 299 Fed. 538, now before this court herein; *Dante v. Miniggio*, 298 Fed. 845 (Ct. App., D. C.); *Wichita Mill & E. Co. v. Namlooze, etc. Industrie*, 3 F. (2d) 931, 932 (C. C. A., 5th Cir.); *S. S. Celia v. S. S. Volturmo* [1921], 2 App. Cas. 544, 547-9, 561; *Lebeaupin v. Crispin* [1920], 2 K. B. 714; *Barry v. Van den Hurk* [1920], 2 K. B. 709, 712; *Di Ferdinando v. Simon* [1920], 3 K. B. 409, 414, affirming [1920], 2 K. B. 704; *Société des Hotels du Touquet-Paris-Plage v. Cumming* [1921], 3 K. B. 459; *In re British American Continental Bk.* [1922], 2 Ch. 575, 581, 583, 587, and *id.* 589, 593; *Uliendahl v. Pankhurst, Wright & Co.* [1923], 39 Times Law Rep. 628; *Peyrae v. Wilkinson* [1923], 156 Law Times 341; *Pavenstedt v. N. Y. L. Ins. Co.*, 203 N. Y. 91; *Gross v. Mendel*, 225 N. Y. 633; *Katcher v. American Exp. Co.*, 94 N. J. L. 165, 171; *Simonoff v. Granite City Nat. Bk.*, 279 Ill. 248, 255; *Grunwald v. Freese*, 34 Pac. 73 (Cal.).

It is a fallacy to argue that, as the marks could have been tendered in Germany at any time after the breach and thus the debt extinguished there, only the value of the marks at the time of judgment should be allowed in the courts of this country. We pass over, for the moment, the obvious and vital consideration that the possibility of such a tender during the war did not exist. The conclusive

answer should be that, in fact, no such tender was ever made or attempted. Hence no benefit should accrue to the defendant therefrom, either directly or indirectly.

Again, involved in the suggestion is an extra-territorial effect for German law to which no other nation is bound to accede. The mark may be legal tender in Germany and thus individuals there may have to yield to the liquidation of their mark indebtednesses by the payment of the marks due, even after the due date. But the United States is not obligated by the German legal tender laws, and certainly not where their plain effect is the defeat of justice. Comity calls for no such sacrifice in our tribunals. We have the right, and indeed the duty, to recognize that failure to pay on the due date at once created the liability, and that subsequent attempted payment of the mere amount of marks originally due is not performance at all.

Marks in the United States are really a commodity and not money. While the legal tender of a country may, in that country, be held by legal fiat at a given and constant value, a commodity is never regarded by the law in any like manner. Foreign money is, consequently, not protected by law in the United States from ordinary scrutiny into the true or market value thereof. Whatever may be proper in Germany,\* here marks due on one date are not

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\* Not even in Germany have the courts acquiesced, with any degree of unanimity, in the suggestion that a pre-war mark indebtedness is properly satisfied and discharged by payment of a like amount of depreciated marks. The State Court of Appeals of Darmstadt on March 29, 1923 (Weekly Law Review, No. 10, p. 459, Leipzig, May 15, 1923), refused to sanction that procedure. It declared "that in good faith in the case of a loan it does not conform to the intention of the contract that the amount advanced in gold or full-valued paper may be returned in well-nigh worthless paper of the same face value, needs no exposition." See also article of Dr. Best, Chief Judge, Darmstadt Court of Appeals, *id.*, p. 451.

assumed to remain of the same value thereafter, any more than other commodities dealt in in our markets. No seller would be permitted to discharge his obligation to deliver a given quantity of merchandise on a day certain by tendering the goods a year later; and no more rightly may a debtor owing foreign money, satisfy his obligation, under our law, by tendering it long after it fell due.

Judge Learned Hand refuted that contention in the case at bar in the District Court (291 Fed. 769). He then said (pp. 770, 771):

“No court can enforce any law but that of its own sovereign, and, when a suitor comes to a jurisdiction foreign to the place of the tort, he can only invoke an obligation recognized by that sovereign. A foreign sovereign under civilized law imposes an obligation of its own as nearly homologous as possible to that arising in the place where the tort occurs. But since, apart from specific performance, such an obligation must be discharged in the money of that sovereign, none other being available, the obligation so created can only be measured in that medium. The form of the obligation must therefore be to indemnify the victim for his loss in terms of the money of the foreign sovereign, and that obligation necessarily speaks as of the time when it arose; that is, when the loss occurred. . . .

“There is, in my judgment, no sound basis for distinction between torts and contracts to pay fixed sums of money. The confusion arises from the assumption that payment after the due date is performance. But that appears to be untrue. A promise to pay a sum at a given day is not a promise to pay then or later. When the promisor defaults, he fails to perform the only promise he has made, and his liability is as much a new creation of the law

as though he had failed to deliver a chattel; or, if it be insisted that his liability is an alternative performance, still that performance is not to pay at any later time, but generally to indemnify the promisee, subject, of course, to the limitations imposed by law. That liability is, as it seems to me, quite analogous to the obligation to indemnify raised upon a tort, and the same reasoning should apply to it. A foreign sovereign will raise an equivalent obligation, but couched in terms of its own money, because that alone it has the power to secure."

## II.

THE PRE-WAR DATE IS PLAINLY THE DATE CONTEMPLATED BY THE TRADING WITH THE ENEMY ACT AS THE PROPER TIME FOR CONVERTING MARK INDEBTEDNESS INTO MONEY OF THE UNITED STATES IN CASES UNDER SAID ACT.

Whatever disposition of the question here mooted might be made upon the consideration of common law principles alone, it is submitted that the Trading with the Enemy Act requires the holding to be as herein contended. Section 9 of the Act specifically provides for the recovery by Americans from the Alien Property Custodian of the pre-war debts due from Germans whose property has been seized. No debt is to be allowed, it is provided, "unless it was owing to and owned by the claimant prior to October 6, 1917" (sec. 9, subd. E). Manifestly the statute contemplates that the situation as it was before the war—"prior to October 6, 1917"—shall be crystallized and fixed. Debts then due and owing may be allowed by the President or awarded to the claimant by the courts. The same debt, whether allowed by the President or by the courts, is evi-

dently intended to remain the same throughout and to be payable in dollars at its pre-war value. So the Circuit Court of Appeals held in the case at bar (299 Fed. at p. 540), Circuit Judge Manton declaring that—

“Any other conclusion would cause confusion and a lack of uniformity in the application of its provisions. It would distort the statute under which the suit is brought to hold that the amount of the debt recoverable thereunder was variable, depending upon the date of judgment. Such a construction would nullify that portion of the statute which permits the president to order the payment of the debt without a judgment.”

Similar considerations must have dictated the provisions in the Versailles Treaty of Peace which fixed the value of the mark, for the purpose of liquidating claims of the nature here involved, at “the pre-war rate of exchange” (part X, sec. III, art. 296, subd. d).

### III.

WHATEVER MIGHT OTHERWISE BE THE CORRECT RULE OF LAW IN PEACE, THE WAR CONDITIONS REQUIRE THE REJECTION OF THE GOVERNMENT'S CONTENTION.

Even if we put aside what has been written above and assume that in normal times the contention of the Government would be correct, it, nevertheless, does not follow that the same rule must be applied in the case at bar or in similar causes. When war was declared between the United States and Germany all intercourse between our citizens and Germans, of course, became illegal. It thereupon became practically impossible for the German debtor

to make a tender of marks to his American creditor and thus discharge the obligation. For their own purposes the nations at war placed the parties in that position, and thus put the debt in suspense and jeopardy. That circumstance, it is submitted, in any event distinguishes cases like that at bar from those in which, in times of peace, a sum of foreign money is due from a citizen of one country to a citizen of another.

The war operated directly to depreciate German currency. All the while that the process of depreciation was going on, neither the creditor nor the debtor was permitted by the law either to demand and collect or to receive and discharge the indebtedness. The loss to be suffered, therefore, by the creditor, if he is to be paid at the recent depreciated value of the mark, is consequently and directly due to the war. It is plainly unjust that American citizens should now have to take in payment and discharge of debts, due them in marks from Germans, at the recent low rates of exchange rather than at the pre-war rates. Fairness and equity should not permit the loss directly resulting from the war to be visited upon the American creditor. Such a rule could have only one of two results: If the money now in the hands of the Alien Property Custodian were hereafter repaid to the German, he would make a profit at the expense of his American creditor. If the money in the hands of the Alien Property Custodian were hereafter retained by the United States, then the Government would have a profit at the expense of its innocent citizen. In neither case could the profit be regarded as conscionable or right.

It is submitted that the precedents which most nearly approximate the situation at bar, in the aspect now under

discussion, are those which were decided after the Civil War in respect of debts payable in Confederate money. It had at first been held, in reference to contracts dischargeable in Confederate money, that the amount due in such cases was the value of the Confederate money at the time and place when due. But in *Effinger v. Kenney*, 115 U. S. 566, this court pointed out the inadequacy and injustice of that rule. There it appeared that the sum of Confederate money was due and payable at a time subsequent to the fall of the Confederate States of America and when that money, therefore, had no value at all; and, if the obligation had been liquidated in accordance with the rule of the decisions first made, the court would have had to decree that the plaintiff was entitled to no more than nominal damages. The injustice of such a holding was patent; and, consequently, it was laid down by this court that contracts dischargeable in Confederate money were rightly to be discharged only by paying, in the money of the United States, the value of the Confederate money at the time and place where the contract was made.

In that manner substantial justice was accomplished. The creditor got just what he gave; the debtor was compelled to pay precisely what he received. The time when they made their arrangement and the time when they must have contemplated the value of the currency with which they dealt, was thus taken by this court, for the purpose of fixing the recovery and adjudging the legal rights of both debtor and creditor, as the date which would best accomplish justice between the parties.

A similar rule could appropriately be applied in cases like that at bar. That thought apparently won the approval of Circuit Judge Rose in *Page v. Levenson*, 281 Fed. 555, 559, for he there remarked that—



“Much might be said in favor of taking the date of the contract as that on which the conversion should be made, for then each party bargains with knowledge of what the consequences of a breach will be.”

#### CONCLUSION.

For the foregoing reasons, it is submitted that the contention of the Government that the conversion of mark indebtedness should be made at the rate of exchange prevailing at the time of decree, is erroneous and should not be adopted by the court.

Washington, D. C., October 12, 1925.

WILLIAM D. GUTHRIE,  
LEWIS R. CONKLIN,  
ISIDOR J. KRESEL,  
BERNARD HERSHKOPF,  
*Amici curiae.*



FILED  
OCT 19 1925

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CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM 1925

No. 80 AND 81

FREDERICK C. HICKS, AS ALIEN PROPERTY CUSTODIAN, AND FRANK WHITE,  
AS TREASURER OF THE UNITED STATES,

*Petitioners,*

vs.

BENJAMIN GUINNESS, WALTER T. ROSEN, MORITZ ROSENTHAL,  
*et al., &c.,*

*Respondents.*

BENJAMIN GUINNESS, WALTER T. ROSEN, MORITZ ROSENTHAL,  
*et al., &c.,*

*Petitioners,*

vs.

FREDERICK C. HICKS, AS ALIEN PROPERTY CUSTODIAN, AND FRANK WHITE,  
AS TREASURER OF THE UNITED STATES, AND CARL JOERGER, *et al., &c.,*

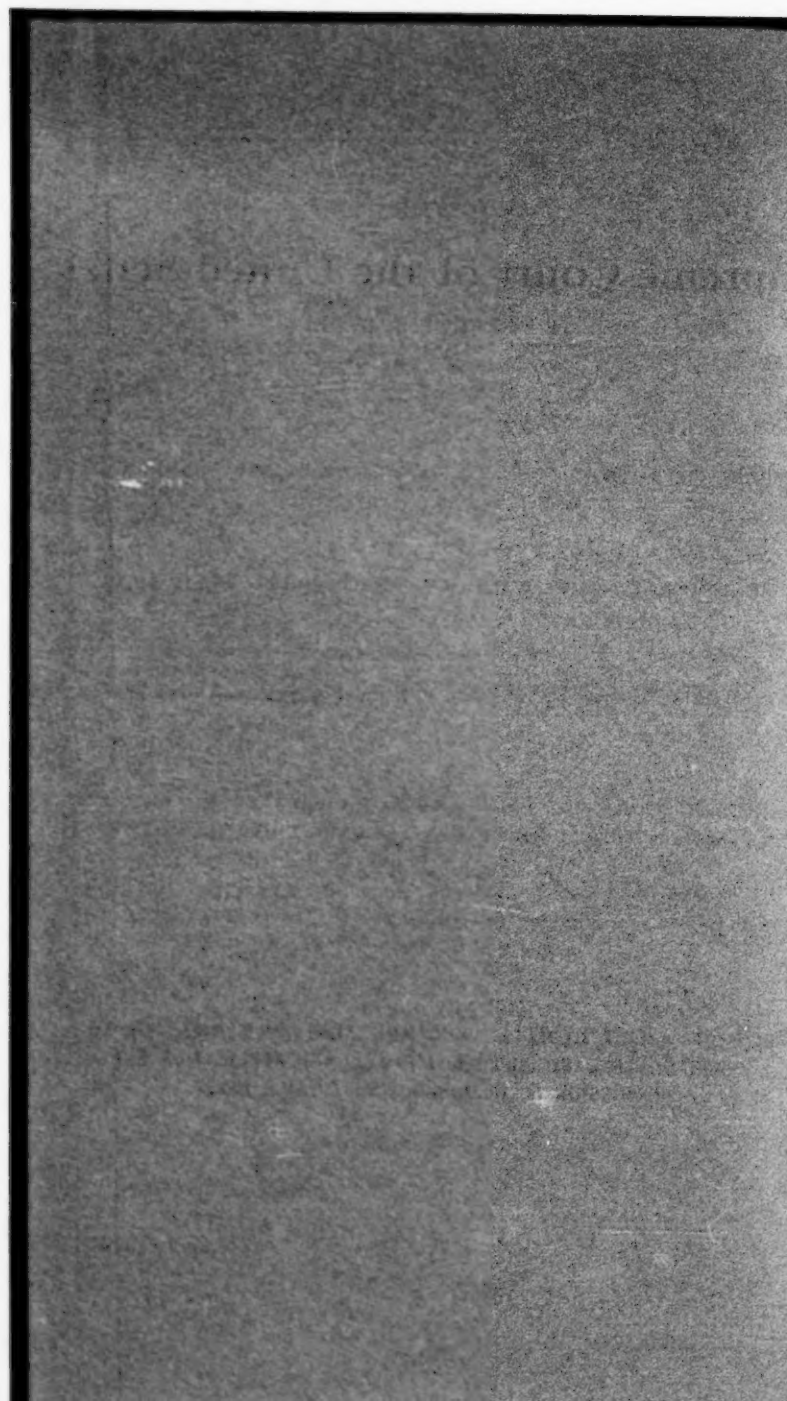
*Respondents.*

ON WRITS OF HABEAS CORPUS TO THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT.

BRIEF OF *AMICI CURIAE*, WHO ARE ALSO SOLICITORS FOR THE  
RESPONDENTS, CARL JOERGER, *ET AL.*, AND APPLICATION FOR  
PERMISSION TO BE HEARD AND TO FILE BRIEF.

THOMAS G. HAIGHT  
AMOS J. PRASLER

*Amici Curiae.*



## SUBJECT INDEX

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	PAGE
Application for Leave to File Brief.....	1
Questions .....	3
Argument .....	5
1. Should the rate of exchange prevailing at the date of the breach or that prevailing at the entry of judgment be used by a Court in con- verting a foreign currency indebtedness into the currency of the country of the forum?...	5
2. Irrespective of treaty provisions, should inter- est be allowed on an indebtedness which be- came due to an American from a German prior to the outbreak of war between their respective countries, during the time that hos- tilities existed?.....	5
3. The provisions of the Treaty of Versailles which were made a part of the Treaty between the United States and Germany do not affect the rate of exchange to be used or interest to be allowed in suits under Section 9 of the Trad- ing With the Enemy Act.....	6
(a) The purposes and meaning of Sections III and IV of Part X of the Versailles Treaty .....	9
(b) Section 9 of the Trading With the Enemy Act .....	12

## II

(c) The Mixed Arbitral Tribunals have consistently construed the rate of exchange and interest provision in Article 297 as having no application to private debtors .....	20
4. There is nothing in the Trading With the Enemy Act itself requiring the universal application of any particular rate of exchange to all suits brought under it.....	25
Conclusion .....	26
Appendix 1.—Agreement of Feb. 25, 1925, between U. S. and Germany.....	28
Appendix 2.—Decision of Anglo-German Mixed Arbitral Tribunal in <i>National Bank of Egypt v. German Government</i> .....	32

### III

#### TABLE OF CASES CITED

	PAGE
<i>Bluhm v. Bluhm</i> —Claim 711—Anglo-German, M. A. T.	21
<i>Bluhm v. Bluhm</i> —Claim 712—Anglo-German, M. A. T.	21
<i>Buhler v. German Government</i> (Recueil 1, p. 489) . . .	24
<i>Catty v. Deutsche Bank</i> —Claim 7—(Recueil 1, p. 317)	23
<i>Chamant v. German Government</i> (Recueil 1, p. 361) .	24
<i>Cie des Metaux v. Mettildutsche Creditbank</i> —Cause 234 (Recueil Nos. 49, 50, 51 and 52, p. 83) . . . . .	21
<i>Fletcher v. German Government</i> —Claim 609—(Re- cueil III, p. 755) . . . . .	24
<i>Marcus v. German Government</i> —Claim 90—Anglo- American M. A. T. . . . .	22
<i>Metcalf v. Mayer</i> (New York Law Journal, Oct. 2, 1925) . . . . .	5
<i>Miller v. Robertson</i> , 266 U. S. 243. . . . .	4
<i>Monnet v. German Government</i> —Claim 14 (Recueil I, p. 418) . . . . .	24
<i>National Bank of Egypt v. German Government</i> — Claim 631 (Recueil 49, 50, 51, 52, p. 18) . . . . .	20, 32
<i>Pegamoid v. German Government</i> —Claim 103—(Re- cueil III, p. 561) . . . . .	23
<i>Rousseau v. German Government</i> —Claim 15—(Re- cueil 1, p. 371) . . . . .	23
<i>Societe Anonyme v. German Government</i> —Claim 32— (Recueil 1, pp. 86, 166, 422) . . . . .	21
<i>Societe Generale v. German Government</i> —Claim 15— (Recueil 1, p. 350) . . . . .	24
<i>Zimmermann v. Hicks</i> , C. C. A. (2nd), decided May 4, 1925 . . . . .	6
<i>Zimmermann v. Hicks</i> , Nos. 629 and 630, U. S. Sup. Ct., Oct. Term, 1925. . . . .	2

# IV

## TABLE OF STATUTES, TREATIES AND INTERNATIONAL AGREEMENTS

	PAGE
Agreement of Feb. 25, 1925, between the United States and Germany, Appendix 1.....	28
Agreement of Aug. 10, 1922, creating the German-American Mixed Claims Commission.....	8
Resolution of Congress of July 2, 1921 (42 Stat. L. 105) .....	15
Trading With the Enemy Act (Act of Oc. 6, 1917—Chap. 106, 40 Stat. at L. 419) with amendments to date .....	3, 6, 11, 12, 16
Treaty of Peace between Germany and the United States (Treaty Series No. 658) (42 Stat. L. 1939) .....	3, 16
Treaty of Versailles (Senate Document No. 49, First Session, 66th Congress) ...	3, 4, 7, 9, 11, 14, 16, 17, 18, 19



IN THE  
**Supreme Court of the United States**

OCTOBER TERM 1925

Nos. 80 and 81

FREDERICK C. HICKS, as Alien Prop-  
erty Custodian, and FRANK WHITE,  
as Treasurer of the United States,  
Petitioners,

VS.

BENJAMIN GUINNESS, WALTER T.  
ROSEN, MORITZ ROSENTHAL, *et al.*,  
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Respondents.

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erty Custodian, and FRANK WHITE,  
as Treasurer of the United States,  
and CARL JOERGER, *et al.*, &c.,  
Respondents.

On Writs of Certiorari  
to the United States  
Circuit Court of Ap-  
peals for the Second  
Circuit.

**Application to be Heard *Amici Curiae*.**

We respectfully ask for permission to file a brief and for  
one of us to be heard *amici curiae*.

We represent the defendant partnership firm of Del-  
bruck, Schickler & Company, against whose property in

the hands of the Alien Property Custodian and the Treasurer of the United States this suit was instituted, and we also represent other German banks and bankers whose property was seized by the Alien Property Custodian, and against whom similiar suits have been instituted by American depositors. One of these suits—*Zimmermann et al. vs. Hicks, etc. and the Deutsche Bank*—has already been decided by the Circuit Court of Appeals for the Second Circuit in favor of our client the Deutsche Bank, and is now in this Court on appeal (Nos. 629 and 630, October term 1925).

One of the questions presented in this case—if this Court finds it necessary to decide it—*i. e.*, the interpretation of some of the provisions of the Treaty of Versailles, *will* arise in the *Zimmermann-Deutsche Bank* case and in similar suits instituted against other banks and bankers. It is of very great importance. Other questions in this case of like importance *may* arise in those cases.

Delbruck, Schickler & Company were not represented in the court below except through the Alien Property Custodian. As they filed no answer and did not appeal from the decision of the District Court or apply for a writ of certiorari to review the decision of the Circuit Court of Appeals, save as it may be considered that those steps were taken by the Alien Property Custodian as their representative, there may be some doubt as to whether they may now be heard as a matter of right in this Court. Consequently this application is made to be heard *amici curiæ*.

We have been assured by counsel for the Alien Property Custodian and the Treasurer of the United States—hereinafter referred to as “Counsel for the Government”—and counsel for the plaintiffs that they will not object to this application.

## BRIEF

### The Questions

The briefs of counsel for the Government and counsel for the plaintiffs set forth the following questions as being presented for decision, but, as will be hereinafter pointed out, it may not be necessary to decide some of them:

1. In a suit under Section 9 of the Trading with the Enemy Act, is a *mark* indebtedness which became due and payable from a German citizen to an American citizen *before the outbreak of the late war*, to be converted into American currency at the rate of exchange prevailing at the date when the indebtedness became due and payable or at the date when judgment in such suit is entered?

2. If the rate of exchange to be used under such circumstances is that prevailing at the date of the entry of judgment, *i. e., the judgment date*, do any of the provisions of the Treaty of Versailles, which were incorporated in the Treaty of August 25th, 1921, between the United States and Germany (herein referred to as "the Treaty of Berlin"), require that the pre-war rate of exchange be used in suits under Section 9 of the Trading with the Enemy Act?

3. Does interest run on such indebtedness during hostilities, irrespective of treaty provisions?

4. If interest does not otherwise run during hostilities, do any of the provisions of the Treaty require that interest be allowed during that time, in suits under Section 9 of the Trading with the Enemy Act?

It is apparent that if the rate of exchange to be applied is that prevailing when the indebtedness became due and payable, *i. e., the breach date*, it will *not* be necessary for this court to decide in the case at bar whether any provisions of

the Treaty of Versailles have been stipulated for its or their benefit.

Therefore, it seems clear that although the Treaty of Versailles was not ratified as such by the United States, the nationals of the United States are entitled by virtue of Act of Congress and the Treaty of Berlin to whatever rights, privileges and advantages were stipulated for the benefit of nationals of the Allied and Associated Powers in the Treaty of Versailles. In this regard Article II of the Treaty of Berlin reads as follows:

"With a view to defining more particularly the obligations of Germany under the foregoing Article with respect to certain provisions in the Treaty of Versailles, it is understood and agreed between the High Contracting Parties:

(1) That the rights and advantages stipulated in that Treaty for the benefit of the United States, which it is intended the United States shall have and enjoy, are those defined in Section I, of Part IV, and Parts V, VI, VIII, IX, X, XI, XII, XIV and XV."

The only question, consequently, is whether the Treaty of Versailles confers any rights, privileges or advantages upon an American national bringing an action under Section 9 of the Trading with the Enemy Act.

Among the provisions of the Treaty of Versailles, to the benefit of which the United States and its nationals are entitled, are the provisions of Part X, entitled "Economic Clauses." In Section IV of Part X is found Article 297 entitled "Property, Rights and Interests." Under this Article the United States was entitled to re-

tain and liquidate all the property which had been taken under its control through the operation of the Trading with the Enemy Act and which is now found in the hands of the Alien Property Custodian. Subdivision (h) of Article 297 provides as follows:

"(h) Except in cases where, by application of paragraph (f), restitutions in specie have been made, the net proceeds of sales of enemy property, rights or interests wherever situated carried out either by virtue of war legislation, or by application of this Article, and in general all cash assets of enemies, shall be dealt with as follows:

(1) As regards Powers adopting Section III and the Annex thereto, the said proceeds and cash assets shall be credited to the Power of which the owner is a national, through the Clearing Office established thereunder; any credit balance in favour of Germany resulting therefrom shall be dealt with as provided in Article 243.

(2) As regards Powers not adopting Section III and the Annex thereto, the proceeds of the property, rights and interests, and the cash assets, of the nationals of Allied or Associated Powers held by Germany shall be paid immediately to the person entitled thereto or to his Government; the proceeds of the property, rights and interests, and the cash assets, of German nationals received by an Allied or Associated Power shall be subject to disposal by such Power in accordance with its laws and regulations and may be applied in payment of the claims and debts defined by this Article or paragraph 4 of the Annex hereto. Any property, rights and interests or proceeds thereof or cash assets not used as above provided may be

retained by the said Allied or Associated Power and if retained the cash value thereof shall be dealt with as provided in Article 243.

In the case of liquidations effected in new States, which are signatories of the present Treaty as Allied and Associated Powers, or in States which are not entitled to share in the reparation payments to be made by Germany, the proceeds of liquidations effected by such States shall, subject to the rights of the Reparation Commission under the present Treaty, particularly under Articles 235 and 260, be paid direct to the owner. If on the application of that owner, the Mixed Arbitral Tribunal, provided for by Section VI of this Part, or an arbitrator appointed by that Tribunal, is satisfied that the conditions of the sale or measures taken by the Government of the State in question outside its general legislation were unfairly prejudicial to the price obtained, they shall have discretion to award to the owner equitable compensation to be paid by that State."

It will be observed that Sub-paragraph (1) of Subdivision (h) relates to Powers which adopt Section III of Part X of the Treaty of Versailles. Sub-paragraph (2) of Subdivision (h) relates to Powers which do not adopt Section III.

Section III of Part X of the Treaty of Versailles, being Article 296 and Annex, relates to a settlement through the intervention of Clearing Offices established by the respective parties, as stated in said Article. It was not contemplated at the time of the negotiation of the Treaty of Versailles that the United States should adopt the plan set forth in Section III and establish the

clearing offices mentioned therein. Accordingly, the Treaty did not make the provisions of Section III obligatory upon the Allied and Associated Powers, but gave to each of them an option (Art. 296, Annex (1) ). It may be said in passing that one of the reasons why it was not contemplated that the United States should adopt the clearing office plan was that under paragraph (b) of Article 296 the Powers adopting that plan would make themselves responsible for the payment of debts, as stated, and it was not expected that legislation to this effect would be readily obtainable in the United States.

But, while the United States did not contemplate the adoption of the clearing office plan, a definite provision was made to meet its situation in Paragraph 4 of the Annex following Article 298. This paragraph is as follows:

"All property, rights and interests of German nationals within the territory of any Allied or Associated Power and the net proceeds of their sale, liquidation or other dealing therewith may be charged by that Allied or Associated Power in the first place with payment of amounts due in respect of claims by the nationals of that Allied or Associated Power with regard to their property, rights and interests, including companies and associations in which they are interested, in German territory, or debts owing to them by German nationals, and with payment of claims growing out of acts committed by the German Government or by any German authorities since July 31, 1914, and before that Allied or Associated Power entered into the war. The amount of such claims may be assessed by an arbitrator appointed by Mr. Gustave

Ador, if he is willing, or if no such appointment is made by him, by an arbitrator appointed by the Mixed Arbitral Tribunal provided for in Section VI. They may be charged in the second place with payment of the amounts due in respect of claims by the nationals of such Allied or Associated Power with regard to their property, rights and interests in the territory of other enemy Powers, in so far as those claims are otherwise unsatisfied."

This paragraph relates to property, rights and interests of German nationals within the territory of an Allied or Associated Power, and it thus embraces the property, rights and interests of German nationals within the territory of the United States and which have been taken over under the Trading with the Enemy Act and are held in the possession of the Alien Property Custodian. Paragraph 4 relates to the net proceeds of the sale, liquidation or other dealing with this property, for Article 297 entitled the United States to sell, liquidate and deal with this property. Paragraph 4 expressly provided that the property, rights and interests of German nationals within the United States and the net proceeds of their sale, liquidation or other dealing therewith might be charged by the United States with certain claims and liabilities stated in that paragraph. Among such charges it is provided that such property and proceeds might be charged with "*debts owing to them* (that is, to United States nationals) *by German nationals*"; that is to say, it was expressly agreed in the Treaty of Versailles that the property in the hands of the Alien Property Custodian, taken under the Trading with the Enemy Act, could be charged with debts owing to citi-



zens of the United States by citizens of Germany. While the provision of Article 4 obviously was intended to apply to the United States, there is interesting internal evidence, aside from the use of the term "Associated Power," of this intent in the provision that the property in the hands of the Alien Property Custodian could be charged with the payment of claims growing out of acts committed by the German Government since July 31, 1914, and "before that Allied or Associated Power entered into the war." That was the American contribution to this portion of the Treaty of Versailles.

Provision is made in Paragraph 4 for an assessment of claims by an arbitrator appointed by Mr. Gustave Ador, or if he made no appointment by an arbitrator appointed by the Mixed Arbitral Tribunal, provided for in Section VI. In lieu of setting up the Mixed Arbitral Tribunal, the United States Government entered into a claims convention with Germany, for the presentation and consideration of claims. The assessment by such a Tribunal was not, however an exclusive provision, for the United States under Article 297 was to have the right to retain and liquidate the property belonging to German nationals within its territory and to carry out its liquidation in accordance with its laws.

Referring again to Sub-paragraph (2) of Sub-division (h), it will be seen that this relates to the United States as a Power not adopting Section III (for the United States, as was contemplated, has not adopted Section III, the clearing office plan), and this sub-paragraph provides that the proceeds of the property of German nationals received by the United States shall be subject to disposal by the United States, in accordance with its laws and regulations, and may be applied

in payment of the claims and debts defined by Article 297 and by Paragraph 1 of the Annex, above quoted.

Thus there is the most explicit provision that the United States, under its treaty with Germany (the Treaty of Berlin), is entitled to the benefit of this provision in the Treaty of Versailles, is entitled to charge against the property in the hands of the Alien Property Custodian the debts owing to its nationals, and having provided remedies to its nationals by Section 9 of the Trading with the Enemy Act, there is direct treaty support of the right of these nationals to obtain that recovery for their debts from the property in the hands of the Alien Property Custodian, in accordance with the provisions of the Trading with the Enemy Act.

In Paragraph 14 of the Annex which follows Article 298 and is the Annex referred to in Article 297 appears the following provision:

"The provisions of Article 297 and this Annex relating to property, rights and interests in an enemy country, and the proceeds of the liquidation thereof, apply to debts, credits and accounts, Section III regulating only the method of payment.

In the settlement of matters provided for in Article 297 between Germany and the Allied or Associated States, their colonies or protectorates, or any one of the British Dominions or India, in respect of any of which a declaration shall not have been made that they adopt Section III, and between their respective nationals, the provisions of Section III respecting the currency in which payment is to be made and the rate of exchange

and of interest shall apply unless the Government of the Allied or Associated Power concerned shall within six months of the coming into force of the present Treaty notify Germany that the said provisions are not to be applied."

This, again, is a provision to the benefit of which the United States and its nationals are entitled by the explicit provisions of the Treaty of Berlin. And while the United States did not adopt the clearing office plan of Article 296 of the Treaty of Versailles, it became entitled by virtue of Paragraph 14 of the Annex following Article 298, being the Annex referred to in Article 297, with respect to the rate of exchange and interest which had been provided in Section III, for it is stated in Paragraph 14 that in the settlement under Article 297 where a Power has not made a declaration adopting Section III, which is the case of the United States, and between the respective nationals, that is, between the nationals of the United States and the nationals of Germany "the provisions of Section III respecting the currency in which payment is to be made and the rate of exchange and of interest shall apply unless the Government of the Allied or Associated Power concerned shall within six months of the coming into force of the present Treaty notify Germany that the said provisions are not to be applied." No one would contend, or could contend, that the United States had given any such notice. Accordingly, the citizens of the United States, in enforcing their rights under the Trading with the Enemy Act, conserved by the Treaty of Berlin, making applicable the provisions of the Treaty of Versailles, are entitled to have the rate of exchange and of interest

And the following provision is found in Paragraph 22 of the Annex to Article 296:

"Subject to any special agreement to the contrary between the Governments concerned, debts shall carry interest in accordance with the following provisions:

Interest shall not be payable on sums of money due by way of dividend, interest or other periodical payments which themselves represent interest on capital.

The rate of interest shall be 5 per cent. per annum except in cases where, by contract, law or custom, the creditor is entitled to payment of interest at a different rate. In such cases the rate to which he is entitled shall prevail.

Interest shall run from the date of commencement of hostilities (or, if the sum of money to be recovered fell due during the war, from the date at which it fell due) until the sum is credited to the Clearing Office of the creditor.

Sums due by way of interest shall be treated as debts admitted by the Clearing Offices and shall be credited to the Creditor Clearing Office in the same way as such debts."

Thus, under Paragraph (d) above quoted, American nationals are entitled to the pre-war rate of exchange and, under Paragraph 22 above quoted, the rate of interest is defined.

It is quite evident that the Circuit Court of Appeals in the case at bar did not understand the provisions of the Treaty of Versailles and failed to give them appropriate effect. Thus it is said that it was recognized that

applied which are specified in the provisions of Section III.

Turning then to the provisions of Section III, thus incorporated by reference in Paragraph 14 of the Annex following Article 298, the following provision is found in Sub-division (d) :

"(d) Debts shall be paid or credited in the currency of such one of the Allied and Associated Powers, their colonies or protectorates, or the British Dominions or India, as may be concerned. If the debts are payable in some other currency they shall be paid or credited in the currency of the country concerned, whether an Allied or Associated Power, Colony, Protectorate, British Dominion or India, at the pre-war rate of exchange.

For the purpose of this provision the pre-war rate of exchange shall be defined as the average cable transfer rate prevailing in the Allied or Associated country concerned during the month immediately preceding the outbreak of war between the said country concerned and Germany.

If a contract provides for a fixed rate of exchange governing the conversion of the currency in which the debt is stated into the currency of the Allied or Associated country concerned, then the above provisions concerning the rate of exchange shall not apply.

In the case of new States the currency in which and the rate of exchange at which debts shall be paid or credited shall be determined by the Reparation Commission provided for in Part VIII (Reparation)."

the plan of Article 296 (Clearing Office plan) had not been adopted by the United States. And reference is made to the provision of Paragraph 14 of the Annex to Article 297, above quoted. But, when the Court came to deal with Article 297, it apparently failed to appreciate the terms of that Article, for the Court says at 299 Fed. 542, 543:

"Article 297 has no reference to payment of debts of Germans due an American. In part of section IV of Article 297, which is headed 'Property Rights and Interest,' provision is made for dealing with and liquidation of property belonging to nationals of allied and associated powers who were in Germany during the war, or property of Germans which was within the territory of the allied and associated powers during the war. It is true that sub-division 14 of the Annex to Section IV includes debts, credits, and accounts, but that is a provision under Article 297, which does not deal with the payment of debts between nationals of various powers, shall include within its scope not only tangible property within the various countries, but also intangible. Credits are made property within the meaning of Article 297 between Germany and the associated states and between their respective nationals. The provisions of Section III respecting currency in which payment is to be made and the rate of exchange and interest shall apply unless the governments of the allied and associated powers concerned shall, within six months of the coming into force of the present treaty, notify Germany that such provisions are not to be applied. Sub-division 14 provides that in the

settlement of matters provided for in Article 297, the provisions as to the rate of exchange and interest provided for in Section III shall apply. And Article 297 provides for the liquidation by the allied and associated powers of all property rights and interest belonging, at the time of the coming into force of the present treaty, to German nationals and companies controlled by them within the territories of the allied and associated powers. Thus the provisions as to the rate of interest and exchange provided for in Section III are made applicable to Article 297 by Sub-division 14 of the Annex to Section IV, namely, in the instance of the liquidation of properties of Germans within the United States.

Sub-division E of Article 297 provides that nationals of the Allied and Associated Powers shall be entitled to compensation with respect to damage or injury inflicted upon their property rights or interests, including any company or association in which they are interested in German territory as it existed on August 1, 1914. This is another instance where the rate of exchange and interest applied, namely, where Germany liquidates the property of American nationals where the property was in Germany as of August 1, 1914, Germany must use the rate of exchange and interest provided for in Section III. We regard these provisions of Article 297 as having no application to a suit under Section 9 of the Trading with the Enemy Act, when the purpose of the suit is to collect a debt owing to an American citizen out of the property of an enemy in the United States, where the property has been seized by the Alien Property Custodian and now

held by the Treasurer of the United States. The rate of exchange is in no way provided for, if such procedure is instituted under Article 297 of the Treaty of Versailles."

This quotation, dealing with Article 297, starts out with the extraordinary statement: "Article 297 has no reference to payment of debts of Germans due an American." Counsel confess that they are unable to understand this statement, as Paragraph 4 of the Annex following Article 298, which is ordinarily called the Annex to Article 297, was inserted for the express purpose of protecting debts due by Germans to Americans. That was not only the purpose but that is the explicit provision of the Article. In view of this misconception, it is hardly necessary to follow the reasoning of the Court, for it was obviously mistaken. The Court deals with Paragraph 14 of the Annex following Article 298, called the Annex to Section IV, but disposes of it by saying that "that is a provision under Article 297, which does not deal with the payment of debts between nationals of various Powers," whereas Article 297, as we have shown, deals expressly with the debts due the nationals of the United States as an Associated Power from German nationals and deals with these debts in relation to the liquidation of property of German nationals held by the United States. By taking debts due from Germans to citizens of the United States out of Article 297, the Court below would defeat the whole purpose of this part of the Treaty of Versailles negotiated by the American Government, and, while not ratified, saved in these provisions by the Treaty of Berlin. The Court of Appeals concludes its statement by saying, after referring



to Sub-division (c) of Article 297, that it regards these provisions as having no application to a suit under Section 9 of the Trading with the Enemy Act, when the purpose of the suit is to collect a debt owing to an American citizen out of the property of an enemy in the United States, where the property has been seized by the Alien Property Custodian and now held by the Treasurer of the United States. But the provisions of Article 297, that is to say, of Paragraph 4 of the Annex following Articles 297 and 298, and referred to in Article 297, apply expressly to the case of a debt owing to an American citizen which is to be satisfied out of the property of an enemy in the United States and are intended directly to apply to the case where property had been seized by the Alien Property Custodian and now held by the Treasurer of the United States. Section 9 of the Trading with the Enemy Act is a method adopted by the United States to permit an American citizen to get his debt out of the property of a German national, and is contemplated by the Treaty of Versailles and the Treaty of Berlin.

It should be borne in mind that in considering the rights of the parties under the Treaty of Berlin applying the provisions of the Treaty of Versailles, the question as to whether or not the debt *owed* by the German defendant to the plaintiffs was *due* on any particular date is irrelevant. Paragraph 22 of the Annex (Section III) to Article 296 of the Treaty of Versailles, relating to interest, is made applicable by paragraph 14 of the Annex in Section IV (following Article 298), and paragraph 22 expressly covers the cases of debts falling due during the war. Such debts are clearly within paragraph 4 of the Annex following Article 298 as being debts to the

payment of which property held by the Alien Property Custodian may be applied. The purpose of Section 9 of the Trading with the Enemy Act is to cover such cases. Plaintiffs clearly have a right, under Section 9 of the Trading with the Enemy Act to bring an action against the Alien Property Custodian to establish a debt *owing* to them by the German national. While there is a restriction that such debt must have been *owing to and owned by them* on October 6, 1917, there is no limitation requiring that it must have been due prior to that date or at any particular date. The debts defined in paragraph 4 of the Annex to Article 297 (following Article 298) of the Treaty of Versailles, are "debts *owing*" to American nationals by German nationals, and by the express words of paragraph 14 of the same Annex the provisions of Article 297 are made to apply to "*debts, credits and accounts.*" There is no limitation in this section of the Treaty which requires proof that the debt be *due* on any particular date. The only significance of the question as to whether or not the debt was due arises in determining *under the common law and aside from treaties* the rate of exchange at which the debt shall be paid. If the plaintiffs below are compelled to rely alone upon their rights at common law and aside from treaties to establish the debt claimed under Section 9 of the Trading with the Enemy Act, the question of the due date of the debt is relevant to determine the rate of exchange applicable and the date from which interest shall run. However, since the Treaty (Paragraph 14, Annex Section IV applying Article 296 (d) Section III) specifically directs the application of a uniform rate of exchange to all debts *owing* by German nationals to American nationals and to all *credits and accounts,*

whether due or not, it seems clear that the only evidence necessary to establish the plaintiffs' case is to prove a debt owing from the German defendant to the plaintiffs, which was owned by them prior to October 6, 1917. This has concededly been done. We submit that under the Treaty between the United States and Germany of August 25, 1921, which is law in this country, the plaintiffs have the above described rights with reference to rate of exchange and rate of interest.

## II.

**Section 9 of the Trading with the Enemy Act is to be liberally construed, and applies to the claim in this suit.**

This section of the Act requires that for the maintenance of a suit thereunder it is necessary only that there be a debt *owned by and owing* to the claimants prior to October 6, 1917. If these provisions are met the cause of action exists.

Section 9 of the Act has received recent interpretation by this Court in *Miller v. Robertson*, 266 U. S. 243. There Mr. Justice Butler, speaking for the Court, said with regard to the general interpretation which the Act is to receive, and particularly Section 9:

"At the time of the passage of the Act, a large amount of property was owned and much business was carried on by alien enemies and their allies in this country. Congress determined that their property should be taken over and that trade

with them should cease. The purpose was to weaken enemy countries by depriving their supporters of power to give aid. But the seizure of the money and property of the enemies and their allies would tend to hinder and might embarrass or ruin those having business transactions with them. *By the taking, the property seized would be put out of the reach of persons claiming it and beyond the power of creditors to attach it for debt.*" (Italics ours.)

It is apparent, therefore, that the Court recognized that one of the necessary effects of the Trading with the Enemy Act was to prevent American nationals, such as the plaintiffs here, from enforcing by attachment suit their rights to collect a debt owing from a German national. But for the provisions of the Trading with the Enemy Act, plaintiffs could unquestionably have brought a suit for the amount of the indebtedness and could have attached the property of the defendant German debtor situated in this country. The Court, in effect, says that the Trading with the Enemy Act was not intended to penalize the American creditor by taking from him the right of attachment suit and other remedies without giving to him in lieu thereof some other means for the collection of his claim. The Court then goes on to say:

"The purpose of Section 9 was to prevent or lessen losses and inconvenience liable to result to non-enemy persons. This provision is highly remedial and should be liberally construed to effect the purposes of Congress and to give remedy in all cases intended to be covered (cites cases). The just purpose of the section is not to be defeated

by a narrow interpretation or by unnecessarily restricting the meaning of the word within technical limitations (cites cases).

Appellants contend that 'debt,' as used in Section 9, is limited to its common law meaning. Undoubtedly, Congress intended to include causes of action which at common law were enforceable in an action of debt, such as those arising on bonds, notes, and other express promises to pay (citing cases) *quantum meruit* and *quantum valebat* (cite cases).

The meaning of the word 'debt' as used in many statutes, is not restricted to demands enforceable in actions of debt."

The learned Justice then cites many examples of statutory construction in which the word "debt" is given a broad meaning, and continues:

"There is nothing in the language of the act of the reasons for its enactment to indicate a purpose to restrict the right to institute suits in equity as authorized in Section 9 to causes of action cognizable in debt under technical procedural rules. The words of a statute are to be read in their natural and ordinary sense, giving them a meaning to their full extent and capacity, unless some strong reason to the contrary appears (cites cases).

We think it is immaterial whether plaintiff's cause of action is one for which an action of debt might be maintained. It would be unreasonable and contrary to the intention of Congress to exclude claims like that here in question, and we hold them to be included."

Giving the statute the interpretation indicated by this Court in the above quoted case, it would appear that the claim here is for a debt cognizable under Section 9 of the Trading with the Enemy Act. The ordinary meaning of the word "debt" is an obligation due or about to become due, embracing a sum due upon demand regardless of whether or not a demand has actually been made. There can be no dispute that according to the ordinary meaning of the words of the statute, as this Court has directed them to be interpreted, the state of facts here shown gives a cause of action to the plaintiffs.

It is to be observed that the only limitation upon the language of the applicable subdivision of the section is:

"Nor in any event shall a debt be allowed under this section unless it was *owing to and owned by* the claimant prior to October 6, 1917" (Section 9 (e)). (Italics ours.)

There is no provision that the debt must be actually due at that time. As a general rule of statutory construction it is held that the word "owing" in a statute means that a debt exists but not necessarily that it has become presently due and payable. We submit that the expressions of this Court in the *Robertson* case indicate that this is the correct meaning to be given here.

### **CONCLUSION.**

For the foregoing reasons, it is submitted that the contention of the Alien Property Custodian and the Treasurer of the United States, that the conversion of the mark indebtedness should be made at the rate of exchange prevailing at the time of decree and that the provisions of the Treaty of Versailles do not apply, is erroneous and should not be adopted by the Court.

Respectfully submitted,

CHARLES E. HUGHES,  
JOSEPH M. HARTFIELD,  
*Amici Curiae.*

Washington, D. C., October 20, 1925.

# SUPREME COURT OF THE UNITED STATES.

Nos. 80 and 81.—OCTOBER TERM, 1925

Frederick C. Hicks, Alien Property  
Custodian, and Frank White, Treas-  
urer of the United States, Peti-  
tioners,

80

*vs.*

Benjamin Guinness, Walter T. Rosen,  
Moritz Rosenthal, et al.

Benjamin Guinness, Walter T. Rosen,  
Moritz Rosenthal, et al., Petitioners,

81

*vs.*

Frederick C. Hicks, Alien Property  
Custodian, Frank White, Treasurer  
of the United States, and Carl Joer-  
ger, et al.

On Writs of Certiorari to  
the United States Cir-  
cuit Court of Appeals  
for the Second Circuit.

[November 16, 1925.]

Mr. Justice HOLMES delivered the opinion of the Court.

These are cross petitions based upon a suit brought against the Alien Property Custodian by Guinness and others, doing business under the firm name of Ladenburg, Thalmann & Co. in New York. The facts are not in dispute. A German firm, Joerger and others doing business under the name of Delbrück, Schickler & Co., was indebted to the American firm under an account stated on December 31, 1916, for 1079.35 marks, subject to a setoff of \$35.35. The debt was not paid when the war between Germany and the United States began, April 6, 1917. The Alien Property Custodian had taken property of the German firm of a value greater than the debt and the American firm brought this suit in equity to recover what was due to it, as provided by the Trading with the Enemy Act of October 6, 1917, c. 106, § 9; 40 Stat. 411, 419, amended by the Act of June 5, 1920, c. 241; 41 Stat. 977. The only ques-  
tions raised and argued here are whether interest is to be allowed



for the time covered by the war, from April 6, 1917, to July 14, 1919, and at what date the value of the mark is to be estimated in dollars in order to fix the amount of the decree. The District Court held that interest was suspended during the war, 291 Fed. Rep. 768, and that the value of the mark at the time when the debt should have been paid was the proper measure. (This value is fixed as 17½ cents.) 291 Fed. Rep. 769. The decree was affirmed by the Circuit Court of Appeals. 299 Fed. Rep. 538. The Alien Property Custodian in the interest of the German debtors seeks to reverse the latter ruling, in No. 80, and the American firm seeks to reverse the former ruling, in No. 81.

We take up the second question first as the principles that govern it have some bearing upon the matter of interest also. We are of opinion that the Courts below were right in holding that the plaintiffs were entitled to recover the value in dollars that the mark had when the account was stated. The debt was due to an American creditor and was to be paid in the United States. When the contract was broken by a failure to pay, the American firm had a claim here, not for the debt, but, at its option, for damages in dollars. It no longer could be compelled to accept marks. It had a right to say to the debtors you are too late to perform what you have promised and we want the dollars to which we have a right by the law here in force. *Gould v. Banks*, 8 Wend. 562, 567. The event has come to pass upon which your liability becomes absolute as fixed by law. *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U. S. 540, 543. There is no doubt that this rule prevails in actions for a tort, *Preston v. Prather*, 137 U. S. 604, and in actions for the failure to deliver merchandise. *Hopkins v. Lee*, 6 Wheat. 109. The principle is the same in a contract for the payment of marks. The loss for which the plaintiff is entitled to be indemnified is 'the loss of what the contractor would have had if the contract had been performed', *Chicago, Milwaukee & St. Paul Ry. Co. v. McCaull-Dinsmore Co.*, 253 U. S. 97, 100; it happens at the moment when the contract is broken, just as it does when a tort is committed, and the plaintiff's claim is for the amount of that loss valued in money at that time. The inconveniences and speculations that would be the result of a different rule have been pointed out in arguments and decisions, and on the other hand the momentary interest of the country of the forum may be in favor of taking the date of the judgment, but the conclusion to which we come

seems to us to flow from fundamental theory and not to need other support. It is in accord with the decisions of several State Courts and Circuit Courts of Appeal as well as of the English House of Lords. *Hoppe v. Russo-Asiatic Bank*, 235 N. Y. 37. *Katcher v. American Express Co.*, 94 N. J. L. 165, 171. *Simonoff v. Granite City National Bank*, 279 Ill. 248, 255. *Wichita Mill & Electric Co. v. Naamlooze &c. Industrie*, 3 Fed. Rep. 2d 931. *S. S. Celia v. S. S. Volturmo* [1921] 2 A. C. 544.

The denial of interest for the time covered by the war seems to us wrong. The cause of action had accrued before the war began, *Young v. Godbe*, 15 Wall. 562, and after it had accrued the question was no longer one of excuse for not performing a contract, but of the continuance of a liability for damages that had become fixed. The obligation of a contract is subject to implied exceptions, but when a liability is incurred by wrong or default it is absolute. Interest is due as one of its incidentals, and inability to pay it no more excuses from that than it does from the principal amount. Of course while the damages remain unpaid interest during one time is as necessary as interest during another to effect the indemnification to which the delinquent is held by the law. There are indications that local and momentary interests have led to a diversity of decisions but here again what we regard as principle has prevailed in later days, *Miller v. Robertson*, 266 U. S. 243; *Hugh Stevenson & Sons, Ltd. v. Aktiengesellschaft für Cartonnagen-Industrie*, [1918] A. C. 239, 245; s. c. [1917] 1 K. B. 842, 850. The case of *Brown v. Hiatts*, 15 Wall. 177, although criticized in the last cited decision, is consistent on its facts with the principle adopted here, since war existed at the time when the cause of action otherwise would have accrued, and it very possibly might be held that war excuses the performance of a contract although it does not impair or diminish a liability already fixed by law. Our decision makes it unnecessary to consider arguments drawn from the Treaty with Germany and the Trading with the Enemy Act.

*No. 80, decree affirmed.*

*No. 81, decree reversed as to interest.*

Mr. Justice STONE took no part in this case.